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No. 14582

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.

THE TIMES-MIRROR COMPANY, a corpora-
tion, Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern
District of California, Central Division

FILED

FEB 15 1955

PAUL P. O'BRIEN,
CLERK

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Court of Appeals
for the Ninth Circuit

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States Attorney,
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600 Federal Building,
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For Appellee:

MACKAY, MCGREGOR, REYNOLDS &
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523 West Sixth Street,
Los Angeles 14, California. [1*]

* Page numbers appearing at foot of page of original Transcript of Record.

In the United States District Court, Southern District of California, Central Division

Civil Action No. 14760-C

THE TIMES-MIRROR COMPANY,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT FOR RECOVERY OF FEDERAL
EXCESS PROFITS TAXES AND INTEREST
FOR THE CALENDAR YEARS 1943,
1944 AND 1945

Plaintiff complains of defendant and for cause of action alleges:

I.

This action arises under the Internal Revenue Laws of the United States, and particularly Sections 23(a) and 23(p) of the Internal Revenue Code.

II.

The plaintiff is a corporation incorporated under the laws of the State of California whose principal office is located at 202 West First Street, Los Angeles 53, California, within the Sixth Collection District of California and within the Southern Judicial District of California, Central Division.

III.

Defendant is a corporation sovereign and body politic. The taxes and interest for the recovery of

which this action is [2] brought were paid to and collected by Harry C. Westover, who at the time of such payment and collection was the duly appointed, qualified and acting Collector of Internal Revenue in and for said Sixth Collection District of the State of California. Said Harry C. Westover is not in office as Collector of Internal Revenue at the time this action is commenced.

IV.

No action upon the claims herein referred to, other than as herein set forth, has been taken before the Congress or any of the departments of the United States or in any court; no assignment or transfer of said claims has been made; the plaintiff is entitled to the amount herein claimed from the defendant; and there is no just credit or offset against said claims which is known to the plaintiff.

V.

The plaintiff is now engaged, and was so engaged during the taxable years here material and for many years prior thereto, in the business of gathering and disseminating the news of the day by the various media known to and customarily employed by the trade. During the calendar years 1943 and 1944 plaintiff incurred expenses in the amounts of \$40,000.00 and \$44,179.04, respectively, representing the cost of microfilming its old newspapers. Said amounts were deducted by the plaintiff on its federal income tax and excess profits tax returns for the respective years. By the Revenue Agent's report

dated February 17, 1948, the full amount of \$40,000.00 for the year 1943 was disallowed and \$36,830.48 of the 1944 deduction was disallowed upon the ground that said amounts should be capitalized and recovered through amortization or depreciation deductions over a 25-year period; and as a result thereof the plaintiff was allowed amortization deductions of \$1,792.70 for the year 1944 and \$3,073.22 for the year 1945. [3]

VI.

On its returns for the calendar year 1945 the plaintiff deducted the amount of \$24,446.50, representing the costs incurred by plaintiff under its pension plan of benefits purchased for employees who were in the military service. Upon an audit of said returns by the Internal Revenue Agent said deduction was disallowed and plaintiff was allowed instead amortization of one-tenth of said cost, or \$2,444.65 upon the theory that such expenditures were made for past service benefits.

VII.

During the years 1944 and 1945 plaintiff deducted the amounts of \$808.51 and \$858.75, respectively, representing current costs of its pension plan with respect to employees of the Southwest Co. It also deducted in each of those years the sum of \$57.25, representing the cost of benefits for employees of Southwest Co. who were in the military service, similar to the amount deducted under the preceding paragraph. Upon the audit of plaintiff's returns said deductions were disallowed in full for the rea-

son that the payments related to employees other than employees of the plaintiff.

VIII.

As a result of the foregoing and other disallowances, the Commissioner of Internal Revenue assessed additional excess profits taxes for the years 1943, 1944 and 1945, with interest thereon to October 21, 1949, against the plaintiff in the aggregate amount of \$121,955.10 as follows:

Year	Excess Profits Tax	Interest
1943.....	\$43,643.15	\$12,856.79
1944.....	36,058.87	8,027.79
1945.....	18,379.45	2,989.05

IX.

The additional excess profits taxes for the years 1943, 1944 and 1945, with interest thereon as set forth above, aggregating \$98,081.47 and \$23,873.63, respectively, were paid under protest by the plaintiff to Harry C. Westover as Collector of Internal Revenue on October 21, 1949.

X.

The expenses incurred during the calendar years 1943 and 1944, representing the costs of microfilming its newspapers, as heretofore alleged, were ordinary and necessary business expenses within the purview of Section 23(a) of the Internal Revenue Code, and the deductions taken by plaintiff on its returns for the years 1943 and 1944 should have been allowed in full. Plaintiff since its first

publication of the Los Angeles Times in 1881 has maintained and does now maintain two sets of bound editions of its printed newspapers, one set for the use of plaintiff's employees and one set for the use of the public. On February 25, 1942, Japanese airplanes were reported to have flown over the Los Angeles area and to have been driven off by the anti-aircraft defenses of the City. Because of the widespread and imminent fear of bombings during the war, which might destroy plaintiff's old records, plaintiff undertook to have its old newspapers microfilmed and copies of such microfilm placed in various places so that if a bomb did destroy its plant it would have available copies of its old newspapers. Said expenditures did not improve or better any facility used in plaintiff's business, nor did it extend or prolong the useful life of any such facility. In the event that this Court should sustain the Commissioner of Internal Revenue in his disallowance of said expenditures, plaintiff alleges that the amortization deduction should be spread over a 10-year period instead of a 25-year period as recommended by the Commissioner of Internal Revenue. [5]

XI.

The full amounts representing the costs of plaintiff's pension plan of benefits purchased for its employees who were in military service were properly deductible on its return for the year 1945. Said payments were not a cost of past service benefits as that phrase is used under Section 23(p) of the Internal Revenue Code. Said payments involved no

past service at all on the part of the returning employees but were expended by the plaintiff in line with the worthy national policy of extending to returning servicemen benefits to which they currently would have become entitled if they had not served in the armed forces. Hence, the amounts were fully deductible as current costs of the plan. In the alternative, said amounts were deductible as an ordinary and necessary business expense under Section 23(a) of the Internal Revenue Code. The deductions taken by the plaintiff as alleged in paragraph VII, representing current costs of the pension plan with respect to employees of the Southwest Co., are deductible under Section 23(p) of the Internal Revenue Code inasmuch as the pension plan, which expressly covered employees of the plaintiff's wholly-owned subsidiary, was formally approved by the Commissioner of Internal Revenue. The services of such employees inured to the benefit of plaintiff; and hence the cost of covering them under plaintiff's pension plan was deductible under the provisions of the Internal Revenue Code and in any event was deductible as an ordinary and necessary business expense.

XII.

Plaintiff is informed and believes, and alleges upon such information and belief, that the deductions taken on its returns for the taxable years here involved were properly allowable under the Internal Revenue Code. The action of the Commissioner in disallowing such deductions was erroneous

and illegal. As a result thereof the plaintiff has overpaid its excess profits tax [6] liability for the years 1943, 1944 and 1945 by the amounts of \$32,400.00, \$30,697.52 and \$23,536.17, respectively, and has overpaid interest thereon in the respective amounts of \$9,544.68, \$6,834.19 and \$2,989.05. Plaintiff is entitled to recover the amount of said overpayments, aggregating \$106,001.61, together with interest thereon from the dates of said overpayments as provided by law.

XIII.

On January 26, 1950, plaintiff filed with the Collector of Internal Revenue at Los Angeles, California, three claims for refund (one for each of the taxable years 1943, 1944 and 1945) of the overpayment of excess profits taxes and interest in the amounts set forth in paragraph XII upon the grounds and facts set forth hereinabove. True and correct copies of said claims for refund are attached hereto, made a part hereof and marked Exhibits A, B and C, respectively. On June 27, 1952, the Commissioner of Internal Revenue issued three statutory notices of disallowance of plaintiff's said claims for refund (one for each taxable year), true and correct copies of which are attached hereto, made a part hereof and marked Exhibits D, E and F, respectively.

XIV.

As a result of all the foregoing, plaintiff has overpaid its federal excess profits tax liability and in-

terest thereon for the years 1943, 1944 and 1945 in the amounts alleged in paragraph XII; said overpayments have not been refunded or credited to plaintiff; the whole is now due and owing to plaintiff, and the Commissioner of Internal Revenue has erroneously and illegally failed and refused to allow the plaintiff's claims for refund and to refund to plaintiff the sums erroneously overpaid.

Wherefore, plaintiff prays for judgment against the defendant in the amount of \$106,001.61, together with interest [7] thereon as provided by law, and for such other and further relief, including costs, as the Court may deem just and proper in the premises.

Dated November 19, 1952.

MACKAY, McGREGOR, REYNOLDS
& BENNION,

/s/ By A. CALDER MACKAY,

/s/ By ADAM Y. BENNION,

Attorneys for Plaintiff

[8]

Duly Verified. [9]

EXHIBIT A

Form 843 Treasury Department Internal Revenue
Service (Revised July 1947)

Claim

To be filed with the Collector where assessment
was made or tax paid.

The Collector will indicate in the block below the

kind of claim filed, and fill in the certificate on the reverse.

[x] Refund of Taxes Illegally, Erroneously,
or Excessively Collected.

State of California,
County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps: The
Times-Mirror Company.

Business address: 202 West First Street, Los Angeles 53, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed:
Sixth, California.

2. Period from 1-1, 1943, to 12-31, 1943.

3. Character of assessment or tax: Excess profits tax.

4. Amount of assessment: \$1,593,962.26; dates of payment October 21, 1949 (last payment).

* * * * *

6. Amount to be refunded: plus interest provided by law, \$41,944.68.*

* * * * *

8. The time within which this claim may be legally filed expires, under section 322 of Internal Revenue Code on December 31, 1950.

The deponent verily believes that this claim should be allowed for the following reasons: See Statement Attached.

representing the cost of two positive prints which were donated to the Huntington Library and the Los Angeles Public Library.

The taxpayer claims that the entire expenditures represented ordinary and necessary business expense and that the deductions taken on the returns for 1943 and 1944 should have been allowed in full.

The taxpayer has always maintained and does now maintain two sets of bound editions of its printed newspapers, one set for the use of the taxpayer's employees and one set for the use of the public. In the taxpayer's day-to-day work the old newspaper files are still used rather than the microfilms. The microfilms have not been used and are not now being used. The newspapers were microfilmed not in order to save [11] space, as is evident from the continued use of the newspapers themselves. The taxpayer's old newspaper files are not deteriorating materially, and microfilming was not done to preserve them from deterioration. The expenditure in question did not improve or better any facility used in the taxpayer's business, nor did it extend or prolong the useful life of any such facility. It was an ordinary and necessary business expense, deductible as such.

2. In the alternative, the amortization deductions should be spread over a ten-year period instead of a twenty-five year period.

3. On its returns for the year 1945 the taxpayer deducted the sum of \$24,446.50, representing the cost under the taxpayer's pension plan of benefits

purchased for employees who were in the military service. Upon the audit of its returns for said year only 10% of such costs, or \$2,444.65, was allowed as a deduction, upon the theory that such expenditure was made to purchase past service benefits, and the balance of the deduction, or \$22,001.85, was disallowed.

The taxpayer claims that the full payment was properly deducted, upon the ground that the payment was not a cost of past service benefits as that phrase is used in the Internal Revenue Code. It involved no past service at all on the part of the returning employees, but was expended by the taxpayer in line with the worthy national policy of extending to returning servicemen benefits to which they currently would have become [12] entitled if they had not served in the armed forces. Hence, the taxpayer contends that the amount paid was fully deductible as a current cost of the plan. In the alternative, the taxpayer contends that the amount was deductible as an ordinary and necessary business expense.

During the years 1944 and 1945 the taxpayer deducted the amounts of \$808.51 and \$858.75, respectively, representing current costs of the pension plan with respect to employees of the Southwest Co. It also deducted in each of those years the sum of \$57.25, representing the cost of benefits for employees of Southwest Co. who were in the military service, similar to the amounts deducted under the preceding paragraph. Upon the audit of taxpayer's returns said deductions were disallowed, for the

reason that the payments related to employees other than employees of the taxpayer.

The taxpayer claims that the pension plan, which was formally approved by the Commissioner of Internal Revenue, expressly covers employees of the taxpayer's wholly-owned subsidiary. The services of such employees inure to the benefit of the taxpayer, and hence the cost of covering them under the taxpayer's pension plan is deductible under the provisions of the Internal Revenue Code, and in any event is deductible as an ordinary and necessary business expense.

4. By virtue of the foregoing disallowances, inter alia, the taxpayer on October 21, 1949 paid to the Collector of Internal Revenue for the Sixth District of California, at [13] Los Angeles, California, the following deficiencies in income tax and excess profits tax and interest thereon:

Year	Income		Excess	
	Tax	Interest	Profits Tax	Interest
1943	\$21,547.55	\$6,089.99	\$43,643.15	\$12,856.79
1944	1,355.02	301.67	36,058.87	8,027.79
1945			18,379.45	2,989.05

5. To the extent, if any, to which this claim for refund exceeds the deficiency for the same year, as stated in the preceding paragraph, the tax was paid by the taxpayer within three years prior to the execution of a waiver extending the statute of limitations, which waiver was executed within three years after the return was filed and which waiver, or an extension thereof, remains in effect at the present time.

6. Claimant requests and demands such further or additional refund or refunds as may now or hereafter appear to be due it by reason of the foregoing or on account of (a) any mistake in fact or in law made by itself or any officer, clerk or other employee of the United States Treasury Department in the preparation, amendment and/or adjustment of its said return, (b) any mistake in the payment and/or collection of the tax made by any person designated in subdivision (a) of this paragraph, (c) any erroneous or illegal requirement or regulation of any officer, clerk or other employee of the United States Treasury Department, (d) any repealed law, whether heretofore or hereafter repealed, (e) any unconstitutional law whether heretofore or hereafter declared unconstitutional, or (f) any other act or matter in connection with the said return, whether covered by the foregoing or not so covered. [14]

This is to certify that the undersigned prepared the foregoing claim for refund and that the statement of facts therein set forth is from information furnished by the taxpayer which the undersigned believe to be true.

/s/ A. Calder Mackay

/s/ Adam Y. Bennion

Attorneys for Taxpayer [15]

EXHIBIT B

Form 844 Treasury Department Internal Revenue
Service (Revised July 1947)

Claim

To be filed with the Collector where assessment was
made or tax paid.

The Collector will indicate in the block below the
kind of claim filed, and fill in the certificate on the
reverse.

[x] Refund of Taxes Illegally, Erroneously,
or Excessively Collected.

State of California,
County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps: The
Times-Mirror Company.

Business address: 202 West First Street, Los An-
geles 53, California.

The deponent, being duly sworn according to law,
deposes and says that this statement is made on
behalf of the taxpayer named, and that the facts
given below are true and complete:

1. District in which return (if any) was filed:
Sixth, California.
2. Period from 1-1, 1944, to 12-31, 1944.
3. Character of assessment or tax: Excess profits
tax.
4. Amount of assessment: \$1,441,525.37; dates of
payment October 21, 1949 (last payment).

* * * * *

6. Amount to be refunded: Plus interest provided
by law, \$37,531.71.*

8. The time within which this claim may be legally filed expires, under section 322 of Internal Revenue Code on December 31, 1950.

The deponent verily believes that this claim should be allowed for the following reasons: See Statement Attached.

*Tax	\$34,108.36
Less post-war credit.....	3,410.84
	<hr/>
	\$30,697.52
Interest overpaid	6,834.19
	<hr/>
	\$37,531.71

/s/ The Times-Mirror Company
By H. W. Bowers, Treasurer

Subscribed and sworn to before me this 12th day of January, 1950.

[Seal] /s/ Mary Bonjean,
Notary Public [16]

[Printer's Note: The Statement which follows here is a duplicate of Statement set out at pages 12-16.]

EXHIBIT C

Form 843 Treasury Department Internal Revenue
Service (Revised July 1947)

Claim

To be filed with the Collector where assessment was made or tax paid.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

[x] Refund of Taxes Illegally, Erroneously,
or Excessively Collected.

State of California,
County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps: The
Times-Mirror Company.

Business address: 202 West First Street, Los An-
geles, California.

The deponent, being duly sworn according to law,
deposes and says that this statement is made on
behalf of the taxpayer named, and that the facts
given below are true and complete:

1. District in which return (if any) was filed:
Sixth, California.
2. Period from 1-1, 1945, to 12-31, 1945.
3. Character of assessment or tax: Excess profits
tax.
4. Amount of assessment: \$808,388.48; dates of
payment October 21, 1949 (last payment).

* * * * *

6. Amount to be refunded: Plus interest provided
by law, \$26,525.22.*

* * * * *

8. The time within which this claim may be legally
filed expires, under section 322 of Internal Rev-
enue Code on December 31, 1950.

The deponent verily believes that this claim

should be allowed for the following reasons: See Statement Attached.

*Tax\$26,151.30

Less post-war credit 2,615.13

\$23,536.17

Interest overpaid 2,989.05

\$26,525.22

/s/ The Times-Mirror Company

By H. W. Bowers, Treasurer

Subscribed and sworn to before me this 12th day of January, 1950.

[Seal] /s/ Mary Bonjean,
Notary Public

[22]

[Printer's Note: The Statement which follows here is a duplicate of Statement set out at pages 12-16.]

EXHIBIT D

U. S. Treasury Department, Washington 25
Office of Commissioner of Internal Revenue—Address reply to Commissioner of Internal Revenue and refer to IT:CL:O:Rej

The Times-Mirror Company June 27, 1952
202 West First St., Los Angeles 53, California

In re: Claims for refund of \$20,522.08, \$41,944.68 for the year 1943.

Gentlemen:

In accordance with the provisions of section 3772 (a)(2) of the Internal Revenue Code, this notice of

disallowance in full of your claim or claims is hereby given by registered mail.

By direction of the Commissioner:

Very truly yours,

E. I. McLarney,

Form 6917

Deputy Commissioner

[28]

EXHIBIT E

U. S. Treasury Department
Washington 25

Office of Commissioner of Internal Revenue.

Address Reply to Commissioner of Internal Revenue and Refer to IT:CL:O:Rej.

The Times-Mirror Company

Jun 27 1952

202 West First Street, Los Angeles 53, Calif.

In re: Claims for refund of \$14,663.09, \$37,-
531.71 for the year 1944.

Gentlemen:

In accordance with the provisions of section 3772 (a) (2) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

By direction of the Commissioner:

Very truly yours,

E. I. McLarney,

Form 6917

Deputy Commissioner

[29]

EXHIBIT F

U. S. Treasury Department
Washington 25

Office of Commissioner of Internal Revenue.

Address Reply to Commissioner of Internal Revenue and Refer to IT:CL:O:Rej.

The Times-Mirror Company Jun 27 1952
202 West First Street, Los Angeles 53, Calif.

In re: Claims for refund of \$11,011.07, \$26,-
525.22 for the year 1945.

Gentlemen:

In accordance with the provisions of section 3772 (a)(2) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

By direction of the Commissioner:

Very truly yours,

E. I. McLarney,

Form 6917

Deputy Commissioner

[30]

[Endorsed]: Filed November 20, 1952.

[Title of District Court and Cause.]

SUMMONS IN A CIVIL ACTION

To the above named Defendant:

You are hereby summoned and required to serve upon Mackay, McGregor, Reynolds & Bennion, plaintiff's attorneys, whose address is 728 Pacific

Mutual Building, 523 West Sixth Street, Los Angeles 14, California (Telephone MIchigan 5175) an answer to the complaint which herewith served upon you, within sixty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: November 20, 1952.

[Seal] EDMUND L. SMITH,
 Clerk of Court
 /s/ L. CUNLIFFE,
 Deputy Clerk [31]

Return on Service of Writ attached. [32]

[Endorsed]: Filed November 26, 1952.

[Title of District Court and Cause.]

ANSWER

Now comes the defendant and answers the complaint filed herein as follows:

1. Admits the allegations contained in paragraph I of the complaint.
2. Admits the allegations contained in paragraph II of the complaint.
3. Admits the allegations contained in paragraph III of the complaint.
4. Admits the allegations contained in paragraph IV of the complaint except defendant denies that

the plaintiff is entitled to the amount claimed or to any amount from the defendant. [33]

5. Admits the allegations contained in paragraph V of the complaint.

6. Admits the allegations contained in paragraph VI of the complaint except defendant denies that the amount of \$24,446.50 deducted by plaintiff in its return was the actual contributions paid by plaintiff under its pension plan in the calendar year 1945.

7. Admits the allegations contained in paragraph VII of the complaint.

8. Admits the allegations contained in paragraph VIII of the complaint except defendant states that the amount of the excess profits tax assessment for the year 1943 was \$48,492.39 which was satisfied in the amount of \$4,849.24 by a post-war credit off-set making the aggregate amount assessed for the years 1943, 1944 and 1945 \$126,804.34.

9. Denies the allegations contained in paragraph IX of the complaint except defendant admits that the excess profits taxes for the years 1943, 1944 and 1945, with interest thereon, were paid or otherwise satisfied by plaintiff under protest on October 21, 1949.

10. Denies the allegations contained in paragraph X of the complaint.

11. Denies the allegations contained in paragraph XI of the complaint.

12. Denies the allegations contained in paragraph XII of the complaint. [34]

13. Denies the allegations contained in paragraph

XIII of the complaint except defendant admits that on January 26, 1950, plaintiff filed claims for refund for the taxable years 1943, 1944 and 1945 for the alleged overpayment of excess profits taxes and interest, and that on June 27, 1952, the Commissioner of Internal Revenue issued statutory notices of disallowance of plaintiff's claims for refund. Exhibits A, B, C, D, E and F, attached to the complaint, appear to be correct copies of the claims for refund as filed and the notices of disallowance.

14. Denies the allegations contained in paragraph XIV of the complaint except defendant admits that no part of the deficiencies in excess profits taxes assessed against plaintiff for the years 1943, 1944 and 1945 have been refunded or credited to plaintiff.

Wherefore having fully answered defendant demands that the complaint be dismissed with costs to the defendant.

WALTER S. BINNS,

United States Attorney

E. H. MITCHELL and

EDWARD R. McHALE,

Assistant U. S. Attorneys,

EUGENE HARPOLE,

Special Attorney, Bureau of the
Internal Revenue,

/s/ E. H. MITCHELL,

Attorneys for Defendant [35]

Affidavit of Service by Mail attached. [36]

[Endorsed]: Filed April 23, 1953.

plaintiff incurred expenses in the amounts of \$40,000.00 and \$44,179.04, respectively, representing the cost of microfilming its old newspapers. Said amounts were deducted by the plaintiff on its Federal income tax and excess profits tax returns for the respective years. By the Revenue Agent's report dated February 17, 1948, the full amount of \$40,000.00 for the year 1943 was disallowed and \$36,830.48 of the 1944 deduction was disallowed upon the ground that said amounts should be capitalized and recovered through amortization or depreciation deductions over a 25-year period; and as a result thereof the plaintiff was allowed amortization deductions of \$1,792.70 for the year 1944 and \$3,073.22 for the year 1945.

3. As a result of the foregoing and other disallowances, the Commissioner of Internal Revenue assessed additional excess profits taxes for the years 1943 and 1944, with interest thereon to October 21, 1949, against the plaintiff in the aggregate amount of \$100,586.60 as follows:

Year	Excess Profits Tax	Interest
1943	\$43,643.15	\$12,856.79
1944	36,058.87	8,027.79

4. Said additional excess profits tax and interest were paid under protest by the plaintiff to Harry C. Westover as Collector of Internal Revenue on October 21, 1949. Said Harry C. Westover was not in office as Collector of Internal Revenue at the time this action was commenced.

5. On January 26, 1950 plaintiff filed with the Collector of Internal Revenue at Los Angeles, Cali-

fornia, claims for refund of a portion of the additional excess profits taxes and interest paid by it as aforesaid, true and correct copies of which may be received in evidence herein as plaintiff's Exhibits 1 and 2 [38] respectively. On June 27, 1952, the Commissioner of Internal Revenue issued statutory notices of disallowance of said claims for refund, true and correct copies of which may be received in evidence herein as plaintiff's Exhibits 3 and 4 respectively.

6. Plaintiff and defendants reserve the right to introduce the testimony of a witness or witnesses as to the nature, purpose and effects of the expenditures in question.

7. The issue raised in the complaints with respect to deductibility of amounts contributed to plaintiff's pension plan in behalf of employees returning from the military services has been abandoned by plaintiff (see page 10 of Plaintiff's Pre-Trial Memorandum). This concession removes the principal issue with respect to the year 1946 in Docket No. 14759-WB and it also removes the principal issue with respect to the year 1945 in Docket No. 14760-WB. The principal issue remaining is whether the microfilming expenses incurred in 1943 and 1944 are properly deductible in those years. The alternative issue, referred to hereinafter, in the event plaintiff is unsuccessful on the principal issue, will affect the tax liability for the years 1945 and 1946 to the extent that there is a difference in amortization deductions as between ten years (contended for by plaintiff) and twenty-five

years (as determined by the Commissioner of Internal Revenue).

Issue of Fact and/or Law

1. Were the expenditures in question ordinary and necessary business expenses, or, on the other hand, were they capital expenditures?

Alternative Issue of Fact

1. In the event the court should hold that the expenditures in question were capital expenditures, then the alternative issue of fact to be tried is the length of the economic useful life of the asset acquired by such expenditures. [39]

The foregoing admissions of fact have been made by the parties in open court at the pre-trial conference; and issue of fact and/or law thereupon stated and agreed to, the court makes this Order which shall govern the course of the trial unless modified to prevent manifest injustice.

Dated February 26, 1954.

/s/ WM. M. BYRNE,

Judge of the U. S. District Court

The foregoing pre-trial Order is hereby approved:

Signed A. Calder Mackay, Adam Y. Bennion,
Attorneys for Plaintiff.

Laughlin E. Waters, U. S. Attorney; Edward
R. McHale, Asst. U. S. Attorney, Chief, Tax
Division; Robert H. Wyshak, Asst. U. S.
attorney; signed Robert H. Wyshak, Asst.
Attorneys for Defendant. [40]

[Endorsed]: Filed February 26, 1954.

[Title of Court and Causes No. 14,759-14,760.]

MINUTES OF THE COURT

Date: June 30, 1954. At Los Angeles, Calif.

Present. Hon. Wm. M. Byrne, District Judge;
Deputy Clerk: Edw. F. Drew; Reporter: None;
Counsel for Plaintiff: No appearance. Counsel for
Defendant: No appearance.

Proceedings: It is Ordered that judgment is
for plaintiff.

It Is Further Ordered that if the parties are in
agreement as to computations, counsel for plaintiff
is directed to prepare and submit findings of fact
and conclusions of law and judgment. And, if not in
agreement, the parties are directed to submit com-
putations in accordance with Local Rule 7(h).

Counsel notified.

EDMUND L. SMITH,

Clerk

/s/ By EDW. F. DREW,

Deputy Clerk

[41]

[Title of District Court and Cause No. 14,760.]

DEFENDANT'S OBJECTIONS TO PROPOSED FINDINGS OF FACT

Defendant objects to certain of the plaintiff's proposed Findings of Fact as not being supported by the evidence:

I.

The second sentence of paragraph V, beginning on page 3, line 27:

"Because of the fear of a bombing, discussions were commenced the following day between the then Treasurer, Secretary and Comptroller of plaintiff and his then assistant (the present Treasurer and Comptroller) looking to the protection of plaintiff's newspaper files, and from those discussions evolved the determination to microfilm the newspapers."

It is submitted that this sentence does not state the gist of the testimony in this regard and at the same time creates an undue inference. This testimony, which was admitted over a materiality and relevancy objection by the defendant, shows that the discussions between the witness, the then Assistant Treasurer, and the Treasurer were merely on an informal, conversational level. The witness testified that he did not engage in any discussions regarding microfilming with the person or persons who decided to have the microfilming done and that he did [42] not know of his own personal knowledge what the decision was based on.

II.

Paragraph VII: "Plaintiff has continued to the present time to microfilm its current newspapers, the filming being done once a month, and the expense thereof is and has been allowed by the Commissioner of Internal Revenue as an ordinary and necessary business expense. Plaintiff also continues to bind two sets of its current newspapers."

This paragraph is immaterial and irrelevant to the issues raised by the pleadings. Furthermore, there is no evidence that the expense there referred to has been affirmatively allowed by the Commissioner of Internal Revenue.

III.

Paragraph IX: "The microfilming was not done to, nor did it, improve the original plant of the plaintiff, or increase, extend or prolong its useful life. It was not done to, nor did it, increase the net or gross income of the plaintiff. It was done solely as a means of protection against the threatened bombing, to permit plaintiff to maintain its business on the same scale, but not to increase it. It did not create an asset or capital value. It was an ordinary and necessary business expense."

There is no competent evidence in the record to support the first three sentences of this paragraph.

The fourth sentence of this paragraph appears to be meaningless, since clearly an asset was created: the microfilm negative which was used in later years to provide additional institutions with copies of the microfilming.

The fifth sentence of this paragraph is a conclusion of law.

LAUGHLIN E. WATERS,

United States Attorney

EDWARD R. McHALE,

Asst. U. S. Attorney, Chief, Tax
Division

ROBERT H. WYSHAK,

Asst. U. S. Attorney

/s/ ROBERT H. WYSHAK,

Attorneys for United States of
America

[43]

Affidavit of Service by Mail attached.

[44]

[Endorsed]: Filed July 26, 1954.

[Title of District Court and Cause No. 14760.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for hearing on June 17, 1954 before The Honorable William M. Byrne, Judge, presiding, without the intervention of a jury. Plaintiff was represented by its counsel, Mackay, McGregor, Reynolds & Bennion, through A. Calder Mackay and Adam Y. Bennion, and the defendant was represented by its counsel, Laughlin E. Waters, United States Attorney for the Southern District of California, and Edward R. McHale and Robert H. Wyshak, Assistant United States Attorneys.

The Court having heard and considered all the evidence, and having considered the pre-trial order entered herein and the pleadings, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

The plaintiff is a corporation organized under the laws of the State of California whose principal office is located [45] at 202 West First Street, Los Angeles 53, California, within the Sixth Collection District of California and within the Southern Judicial District of California, Central Division.

II.

The plaintiff is now engaged, and was so engaged during the taxable years here material (to wit, 1943 and 1944) and for many years prior thereto, in the business of gathering and disseminating the news of the day by the various media known to and customarily employed by the trade. During the calendar years 1943 and 1944 plaintiff incurred expenses in the amounts of \$40,000.00 and \$44,179.04, respectively, representing the cost of microfilming its old newspapers. Said amounts were deducted by the plaintiff on its Federal income tax and excess profits tax returns for the respective years. By the Revenue Agent's report dated February 17, 1948, the full amount of \$40,000.00 for the year 1943 was disallowed and \$36,830.48 of the 1944 deduction was disallowed upon the ground that said amounts should be capitalized and recovered through amor-

tization or depreciation deductions over a 25-year period; and as a result thereof the plaintiff was allowed an amortization deduction of \$1,792.70 for the year 1944. As a result of the foregoing and other disallowances, the Commissioner of Internal Revenue assessed additional excess profits taxes for the years 1943 and 1944, with interest thereon to October 21, 1949, against the plaintiff in the aggregate amount of \$100,586.60 as follows:

Year	Excess Profits Tax	Interest
1943.....	\$43,643.15	\$12,856.79
1944.....	36,058.87	8,027.79

said additional excess profits tax and interest were paid under protest by the plaintiff to Harry C. Westover as Collector of Internal Revenue on October 21, 1949. Said Harry C. Westover was not in office as Collector of Internal Revenue at the time [46] this action was commenced.

III.

On January 26, 1950 plaintiff filed with the Collector of Internal Revenue at Los Angeles, California, claims for refund of a portion of the additional excess profits taxes and interest paid by it as aforesaid. On June 27, 1952, the Commissioner of Internal Revenue issued statutory notices of disallowance of said claims for refund.

IV.

Since its first publication of the Los Angeles Times in 1881 plaintiff has maintained and does now maintain bound copies of its printed newspapers. For the period subsequent to 1910 plaintiff

has two sets of such bound editions, one of which is kept in a vault on the third floor of its building and is not used. The other set is kept in the same vault and is used by the plaintiff's officers and employees in the day-to-day operation of plaintiff's business and is also used by the public under the supervision of plaintiff's Chief Librarian. For the period prior to 1910 the plaintiff has only one set of the bound editions of its newspapers and for portions of the time prior to 1910 various of the bound volumes are missing. This was due to a bombing of plaintiff's plant and building in 1910, which also damaged certain of the volumes still on hand.

V.

On February 25, 1942, enemy aircraft were reported to have flown over the Los Angeles area and to have been driven off by anti-aircraft defenses. Because of the fear of a bombing, discussions were commenced the following day between the then Treasurer, Secretary and Comptroller of plaintiff and this then assistant (the present Treasurer and Comptroller) looking to the protection of plaintiff's newspaper files, and from those discussions evolved the determination to microfilm the newspapers. [47] Having determined to microfilm the newspapers, plaintiff made an effort to borrow some of the earlier issues which were missing in its library and it was able to borrow certain of such issues. The total microfilming done during 1943 and 1944 consisted of 850,579 pages, of which only 30,579 pages represented issues that

were borrowed for the purpose of microfilming. However, there are still several volumes of the newspapers which are missing and of which the plaintiff has no copies, either in the bound set or on microfilm.

VI.

A negative and three positive prints were made. One positive print was donated by plaintiff to the Los Angeles Public Library and another to the Huntington Memorial Library, San Marino, California. The third positive print is kept by plaintiff in the corridor outside the vault containing the bound volumes on the third floor of its building. The negative is kept in a vault on the fourth floor. The expense of the microfilming was charged on plaintiff's books as an expense; no asset or capital account was created.

VII.

Plaintiff has continued to the present time to microfilm its current newspapers, the filming being done once a month, and the expense thereof is and has been allowed by the Commissioner of Internal Revenue as an ordinary and necessary business expense. Plaintiff also continues to bind two sets of its current newspapers.

VIII.

The microfilming of the newspapers was not done to conserve space, inasmuch as plaintiff has ample space in its present vault to accommodate two sets of its newspapers for a period of 40 to 60 years in the future, and it can then eliminate one set and

thus have sufficient space for some 80 to 100 years [48] in the future. Nor was the microfilming done to protect the plaintiff against deterioration of its bound volumes, to be used in lieu of the bound volumes, because deterioration is not rapid, particularly with respect to the set which is not used. The microfilm is never used by the plaintiff whenever there is a bound volume. It is resorted to from two to six times a year by the Chief Librarian of the Los Angeles Times to answer inquiries from the public regarding a period so long ago that plaintiff does not have a bound volume. It was used occasionally for two years by two members of plaintiff's editorial staff in preparing a column of what had appeared in the Times sixty years earlier, but this use occurred only when bound volumes were missing. Since 1950 the column was moved up to fifty years ago, and since bound volumes are available for all periods since 1910 the microfilm is no longer used for that purpose. The microfilm is difficult to read and cannot be used for long periods of time without resting. The photographing of the bound volumes makes reading difficult and at times impossible, because the binding was not broken and the material in the middle of the pages is not readable.

IX.

The microfilming was not done to, nor did it, improve the original plant of the plaintiff, or increase, extend or prolong its useful life. It was not done to, nor did it, increase the net or gross income of the plaintiff. It was done solely as a means of

protection against the threatened bombing, to permit plaintiff to maintain its business on the same scale, but not to increase it. It did not create an asset or capital value. It was an ordinary and necessary business expense. [49]

Conclusions of Law

I.

The Court has jurisdiction of this action and of the parties thereto.

II.

The expense of microfilming plaintiff's newspapers was an ordinary and necessary expense incurred in its trade or business under Section 23(a)(1) of the Internal Revenue Code, and was not a capital expenditure.

III.

The plaintiff filed a duly executed claim for refund of excess profits tax overpaid by it for each of the calendar years 1943 and 1944 with the Collector of Internal Revenue within the period allowed therefor by Section 322(b) of the Internal Revenue Code, and said claims having been disallowed plaintiff duly commenced this action upon the facts and grounds set forth in said claims and within the period allowed therefor by Section 3772(a) of the Internal Revenue Code.

IV.

Plaintiff, the Times-Mirror Company, is entitled to judgment against defendant, United States of

America, for refund of excess profits tax and interest paid by it for the calendar years 1943 and 1944 in the following amounts, which amounts were paid by plaintiff on October 21, 1949:

	1943	1944
Excess Profits Tax.....	\$36,000.00	\$33,285.89
Minus 10% post-war refund credit	3,600.00	3,328.59
	<hr/>	<hr/>
Net Tax Refundable.....	\$32,400.00	\$29,957.30
Interest paid by plaintiff....	9,544.68	6,669.39
	<hr/>	<hr/>
Total.....	\$41,944.68	\$36,626.69

Said judgment shall bear interest at 6 per cent per annum from October 21, 1949.

Dated this 29th day of July, 1954.

/s/ WM. M. BYRNE,
United States District Judge

Disapproved as to form:

/s/ LAUGHLIN E. WATERS, U. S. Atty.

/s/ ROBERT H. WYSHAK, Asst. U. S. Atty.

[Endorsed]: Lodged July 23, 1954; Filed July 29, 1954. [51]

In the United States District Court for the Southern District of California, Central Division

Civil Action No. 14760-WB

THE TIMES-MIRROR COMPANY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This cause came on for hearing on June 17, 1954 before The Honorable William M. Byrne, Judge, presiding, without the intervention of a jury. Plaintiff was represented by its counsel, Mackay, McGregor, Reynolds & Bennion, through A. Calder Mackay and Adam Y. Bennion, and the defendant was represented by its counsel, Laughlin E. Waters, United States Attorney for the Southern District of California, and Edward R. McHale and Robert H. Wyshak, Assistant United States Attorneys. The Court having made and filed its Findings of Fact and Conclusions of Law,

It Is Hereby Ordered, Adjudged and Decreed that plaintiff, The Times-Mirror Company, have and recover against the defendant, the United States of America, the sum of \$41,944.68 for the year 1943, with interest at the rate of six per cent per annum on said sum from October 21, 1949 to a date [53] preceding the issuance of the refund check by not more than 30 days; and that the

plaintiff, The Times-Mirror Company, have and recover against the defendant, the United States of America, the sum of \$36,626.69 for the year 1944, with interest at the rate of six per cent per annum from October 21, 1949 to a date preceding the issuance of the refund check by not more than 30 days, with no costs to either party.

Dated this 29th day of July, 1954.

/s/ WM. M. BYRNE,
United States District Judge

Approved as to form:

/s/ LAUGHLIN E. WATERS, U. S. Atty.

/s/ ROBERT H. WYSHAK, Asst. U. S. Atty.

[Endorsed]: Lodged July 23, 1954; Judgment
Filed and Entered July 29, 1954. [54]

[Title of District Court and Cause No. 14760.]

NOTICE OF APPEAL

To the above named Plaintiff and to its Attorneys,
Mackay, McGregor, Reynolds & Bennion, 728
Pacific Mutual Building, 523 West Sixth St.,
Los Angeles 14, California:

You, and Each of You, Are Hereby Advised that the defendant, United States of America, does hereby appeal to the Court of Appeals for the Ninth Circuit from the order for judgment of plaintiff entered June 30, 1954, and from the judgment en-

tered July 29, 1954, in the above entitled case.

Dated: This 26th day of August, 1954.

LAUGHLIN E. WATERS,

United States Attorney

EDWARD R. McHALE,

Assistant U. S. Attorney, Chief, Tax
Division

ROBERT H. WYSHAK,

Assistant U. S. Attorney

/s/ ROBERT H. WYSHAK,

Attorneys for Defendant, United
States of America

[56]

Affidavit of Service by Mail attached.

[57]

[Endorsed]: Filed August 26, 1954.

[Title of District Court and Cause No. 14760.]

APPELLANT'S STATEMENT OF POINTS

Pursuant to the provisions of Federal Rule of Civil Procedure 75(d), appellant hereby designates the following points upon which it intends to rely on its appeal, to-wit:

The Trial Court erred:

(1) In its finding V that—"Because of the fear of a bombing, discussions were commenced the following day between the then Treasurer, Secretary and Comptroller of plaintiff and his then assistant (the present Treasurer and Comptroller) looking to the protection of plaintiff's newspaper files, and

from those discussions evolved the determination to microfilm the newspapers.”

Said finding was clearly erroneous in that it was not [58] supported by competent evidence.

(2) In its finding VII that—“Plaintiff has continued to the present time to microfilm its current newspapers, the filming being done once a month, and the expense thereof is and has been allowed by the Commissioner of Internal Revenue as an ordinary and necessary business expense. Plaintiff also continues to bind two sets of its current newspapers.”

Said finding is clearly erroneous and not supported by the evidence and is immaterial and irrelevant to the issues raised by the pleadings.

(3) In its finding IX that—“The microfilming was not done to, nor did it, improve the original plant of the plaintiff, or increase, extend or prolong its useful life. It was not done to, nor did it, increase the net or gross income of the plaintiff. It was done solely as a means of protection against the threatened bombing, to permit plaintiff to maintain its business on the same scale, but not to increase it. It did not create an asset or capital value. It was an ordinary and necessary business expense.”

Said finding is clearly erroneous as there was no competent evidence in the record to support it.

(4) In holding in its conclusions of law, No. II, that the expense of microfilming plaintiff's newspapers was an ordinary and necessary expense incurred in its trade or business under Section 23

(a)(1) of the Internal Revenue Code, and was not a capital expenditure;

(5) In holding that the plaintiff-appellee, The Times-Mirror Company, was entitled to judgment against appellant, [59] United States of America, for refund of excess profits tax and interest paid by it for the calendar years 1943 and 1944;

(6) In entering judgment for the Times-Mirror Company for the resulting overpayment of excess profits tax and interest paid by it for the calendar years 1943 and 1944.

LAUGHLIN E. WATERS,

United States Attorney

EDWARD R. McHALE,

Assistant U. S. Attorney

Chief, Tax Division

ROBERT H. WYSHAK,

Assistant U. S. Attorney

/s/ ROBERT H. WYSHAK,

Attorneys for Defendant-Appellant,

United States of America [60]

Affidavit of Service by Mail attached. [61]

[Endorsed]: Filed November 9, 1954.

[Title of District Court and Cause No. 14760.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Appellant, United States of America, designates the following portions of record, proceedings and evidence to be contained in the record on appeal to be transmitted to the Court of Appeals for the Ninth Circuit, which by order of Court, may be designated therein up to, and including, November 24, 1954:

1. Summons and Complaint, filed November 20, 1952;
2. Answer of Defendant, United States of America, filed April 23, 1953;
3. Plaintiff's Pre-Trial Order, filed February 26, 1954;
4. Minutes of the Court, dated June 30, 1954;
5. Findings of Fact and Conclusions of Law, dated and filed July 29, 1954;
6. Defendant's Objections to Proposed Findings of Fact, filed July 26, 1954;
7. Judgment, dated and filed July 29, 1954;
8. Notice of Appeal to the Court of Appeals for the Ninth Circuit, filed August 26, 1954; [62]
9. Motion for Extension of Time to Docket Cause on Appeal and Order, dated and filed September 28, 1954;
10. Appellant's Statement of Points to be Relied Upon on Appeal;

11. This Designation of Contents of Record on Appeal; and

12. Reporter's Transcript of Proceedings on June 17, 1954.

Dated: This 29th day of October, 1954.

LAUGHLIN E. WATERS,

United States Attorney

EDWARD R. McHALE,

Assistant U. S. Attorney,

Chief, Tax Division

ROBERT H. WYSHAK,

Assistant U. S. Attorney

/s/ ROBERT H. WYSHAK,

Attorneys for Defendant-

Appellant

[63]

[Endorsed]: Filed November 9, 1954.

[Title of District Court and Cause No. 14760.]

MOTION FOR EXTENSION OF TIME TO
DOCKET CAUSE ON APPEAL AND
ORDER

Comes Now the defendant-appellant, and moves the Court to extend the time to docket the cause on appeal 50 days under Federal Rule Civil Procedure 73(g) upon the grounds that the Attorney General of the United States has just decided to prosecute this appeal and additional time is neces-

sary within which to secure a transcript and prepare the designation of record on appeal.

Dated: September 28, 1954.

LAUGHLIN E. WATERS,

United States Attorney

EDWARD R. McHALE,

Assistant U. S. Attorney

Chief, Tax Division

ROBERT H. WYSHAK,

Assistant U. S. Attorney

/s/ ROBERT H. WYSHAK,

Attorneys for Defendant-

Appellant

[64]

Order

Good Cause Appearing Therefor:

It Is Hereby Ordered that the time within which to file the record and docket the above entitled cause in the United States Court of Appeals for the Ninth Circuit be, and the same is hereby, extended to and including the 24th day of November, 1954.

Dated: September 28, 1954.

/s/ WM. M. BYRNE,

United States District Court

Presented by:

/s/ ROBERT H. WYSHAK,

Assistant United States Attorney [65]

[Endorsed]: Filed September 28, 1954.

[Title of District Court and Cause No. 14760.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, hereby certify that the foregoing pages numbered from 1 to 65, inclusive, contain the original Complaint; Summons; Answer; Pre-Trial Order; Defendant's Objections to Proposed Findings of Fact; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Statement of Points to be Relied Upon on Appeal; Designation of Record on Appeal and Motion and Order Extending Time to Docket Appeal and a full, true and correct copy of Minutes of the Court for June 30, 1954, which, together with the original exhibits and Reporter's Transcript of Proceedings on June 17, 1954, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 18th day of November, A.D. 1954.

[Seal]

EDMUND L. SMITH,
Clerk

/s/ By THEODORE HOCKE,
Chief Deputy

[Title of District Court and Causes No. 14759-60.]

TRANSCRIPT OF PROCEEDINGS

Los Angeles, Calif., Thursday, June 17, 1954

Honorable Wm. M. Byrne, Judge presiding. [1*]

* * * * *

HARRY W. BOWERS

called as a witness herein on behalf of the Plaintiff,
being first duly sworn, was examined and testified
as follows, to-wit: [8]

* * * * *

Direct Examination

Q. (By Mr. Mackay): Mr. Bowers, where do
you reside?

A. 521 North McCadden Place, Los Angeles.

Q. And have you been living at that place for
some time?

A. At that particular address, four years.

Q. And you have lived in Los Angeles a long
time before that, haven't you? A. 30 years.

Q. What is your occupation?

A. I am Treasurer and Comptroller of The
Times-Mirror Company.

Q. How long have you been Treasurer and
Comptroller of the Los Angeles Times-Mirror Com-
pany?

A. Since the 6th of January, 1946.

Q. 1946. Prior to that time, what was your occu-
pation? A. I was Auditor.

* Page numbers appearing at top of page of original Reporter's
Transcript of Record.

(Testimony of Harry W. Bowers.)

Q. How long had you been Auditor for the Times-Mirror? For the Times-Mirror, you mean?

A. For the Times-Mirror Company, yes, sir.

Q. How long had you been Auditor prior to that time? A. Since 1935 up to that time.

Q. What had been your experience prior to that time, Mr. Bowers?

A. I was trained in school in business administration, [9] part of which was accounting, the major portion of which was accounting and later I entered the field of public accounting and finally into private practice.

Q. To what extent were you in public accounting?

A. 3 years in Toledo, Ohio, and one year in Los Angeles.

Q. And were you by yourself or were you with a firm? A. I was with two national firms.

Q. Will you please give us the name of that company you were with in Ohio?

A. I was with Price Waterhouse or the predecessor of Lybrand, Ross & Montgomery, in Los Angeles, and Ernst & Ernst at Toledo, Ohio.

Q. Now, the record shows, Mr. Bowers, that the plaintiff, The Times-Mirror Company, in 1943 and 1944 expended the sums of \$40,000.00 and \$44,179.04, respectively, as the cost of microfilming its old newspapers. A. That is correct.

Q. Now, can you tell the court what portion of the total cost represented the cost of the negative

(Testimony of Harry W. Bowers.)

and what represented the cost of the three prints, the positive prints?

A. I will have to refresh my memory on that by looking at a memorandum.

Q. Yes, do so.

A. The total cost was \$84,179.04. The portion pertaining to the cost of the negatives was \$73,-156.19. The balance, [10] \$11,022.85 was for the 3 positive prints.

Q. Now, Mr. Bowers, prior to that time, did The Times-Mirror Company or had it kept a record of the daily and Sunday editions?

A. The practice of The Times was to make 2 records or 2 bound volumes monthly, of the current issues of the daily publications and Sundays.

Q. And in 1942 how many such bound editions did The Times-Mirror have?

A. How many?

Q. Yes, two sets?

A. They had two sets of most of the volumes.

There were some missing volumes in the early years of the publication of The Times.

Q. Do you remember what years were missing?

A. I can give you the dates of the issues that were missing.

Q. Yes.

A. Pardon me, until I get the note on it. The years missing: I will give this by years, 1884 is missing.

Q. Yes?

A. The years 1889 to 1893 are missing.

(Testimony of Harry W. Bowers.)

Q. These were missing in 1942?

A. 1889 to 1893, those years are missing. [11]

Q. O. K. A. And 1884.

Q. All right. Go ahead?

A. Now you are asking about the missing copies, Mr. Mackay.

Q. Yes.

A. Now, there are also in that particular classification, you might call it, instances where the records or the volumes are not in the best of condition. Do you want me to give that record too?

Q. Yes.

A. All right. Now, December 4, 1881 to December 31, 1882, some of the issues are watermarked and brittle; 1885, there was fire damage, the paper is brittle, bound by cord and the papers torn.

Mr. Wyshak: Would you repeat that, please?

The Witness: I beg your pardon?

Mr. Wyshak: Would you repeat your last statement? I didn't hear it.

A. I will read it entirely: In 1885 there was some of it fire damaged and paper brittle, and some of it bound by cord and some of the pages torn. That is 1885.

1886: That year the package is wrapped and bound by cord.

1887: June 1 to June 30th, the package is wrapped and tied with a string. That is a condition of the file. [12] Now, June 1 to December 31st of that year, they were tied together with strings and binding loose and they come apart.

(Testimony of Harry W. Bowers.)

1888: In fairly good condition, paper is brittle and tearing.

Now, that is the record of the condition of our early files. After that, they were in very good condition.

Q. Do you know what caused the water damage and the other damage that you have spoken about?

A. Well, from my observation and examination, that fire and water condition is due to the bombing of 1910, a result of the bombing of 1910.

The Court: Mr. Mackay, I just want to make **this statement** in connection with your interrogation. Ordinarily in this court we use the lectern. I wasn't going to say anything and see if we could get by this morning without its use so you could sit there at counsel's table, but immediately you will see the difference, the reason that we use it, because otherwise the witness naturally drops his voice and talks to the person who is interrogating him, so when you are sitting there he drops his voice and other counsel can't hear it over there.

Mr. Mackay: I understand.

The Court: When you use the lectern, the witness speaks to you and keeps his voice up so everyone can hear him.

Mr. Mackay: I think that is a good idea, your Honor.

The Court: And that is the only reason I require its use. [13]

Q. When did you say the bombing took place? In 1910, was it? A. October 1, 1910.

(Testimony of Harry W. Bowers.)

Mr. Mackay: There is no question about that.

Q. Now, I will ask you, Mr. Bowers, since The Times-Mirror Company had two sets of its old records except the ones you said were missing, why it was decided to microfilm its old issues?

Mr. Wyshak: Your Honor, I object to that question as not the best evidence and not competent evidence of a fact of what the Corporation intended or why it did this.

The Court: Objection overruled.

The Witness: To get that clear, I would like to have that question.

Mr. Mackay: Will you please read the question, Mr. Reporter?

(Pending question read as above recorded.)

The Witness: If I may, I would like to start with what created this expenditure.

Mr. Mackay: Go ahead.

A. On the morning of February 25th, which is the date of that issue there (indicating), I came into the office, and my predecessor Mr. Downing, who was the only member I believe or employee that was then living that went through the 1910 bombing, had experience of what that type of activity [14] would do to your records, and we were discussing the probable results if one of those bombs should happen to be dropped upon our building. And I might add here, if I may, that while I slept through that, that night, I didn't hear any of it, nevertheless, when I got up in the morning and read about it, it was a concern of practically

(Testimony of Harry W. Bowers.)

anybody to talk about. And Mr. Downing got to discussing it and I brought up the question: Supposing one of the bombs or two or more dropped on our building and destroyed it, if our building was destroyed, if our equipment was destroyed, if our inventory was destroyed, we would undoubtedly come out with a paper the next day, but, if our back issues were destroyed, that is something that couldn't be replaced.

Q. Now, may I call your attention to this: Is this an issue of the Los Angeles Times gotten out upon Wednesday morning, February 25, 1942?

A. That is a photostatic copy of one of our file copies.

Q. That is. And is this (Indicating) also a photostatic copy of one of your file copies, dated February 26th, 1942?

A. That is.

Mr. Mackay: If the Court please, I should like to offer these in evidence; the first one here being dated February 25, 1942, as the first exhibit.

The Court: It will be received. [15]

(Said copy of Los Angeles Times issue dated February 25, 1942, was received in evidence and marked as Plaintiff's Exhibit No. 1.)

The Clerk: Exhibit 1.

Mr. Mackay: And the next one as the second exhibit.

The Court: It will be received.

(Said copy of Los Angeles Times issue dated February 26, 1942, was received in evidence and marked as Plaintiff's Exhibit No. 2.)

(Testimony of Harry W. Bowers.)

The Clerk: The issue of February 25th is Exhibit 1 and the issue of February 26th is Exhibit 2.

Mr. Mackay: I have another one from the Los Angeles Examiner which I should like to offer. I appreciate that it is somewhat cumulative, but it does show anyway that it was universally thought that we had a bombing and it scared everyone in this city. I would like to offer this in evidence.

The Court: It may be received.

The Clerk: Exhibit 3.

(Said copy of a page of the Los Angeles Examiner issue dated February 25, 1942, was received in evidence and marked as Plaintiff's Exhibit 3.)

Mr. Wyshak: What was the date of that one?

The Clerk: That is February 25, 1942.

Q. (By Mr. Mackay): Now, Mr. Bowers, do I understand your [16] testimony that it was because of the general alarm about an air raid at Los Angeles at that time, you decided to microfilm your old past issues?

A. Due to that warning, the danger was discussed and from that it resulted eventually in the contract of having the back issues microfilmed.

Q. And then you did go ahead, you had the microfilming done and you had the negatives developed?

A. Yes, that is right, and we had 3 prints made.

Q. And where did you put the negative films?

(Testimony of Harry W. Bowers.)

A. The negative films are lodged in the Treasurer's safe in the Times-Mirror.

Q. On what floor?

A. On the 4th floor.

Q. Did you also have some positive prints made from the negatives?

A. We had 3 made. One is lodged in the editorial department on the 3rd floor of The Times Building outside of their vaults, one set is lodged with the Los Angeles Public Library, and one with the Huntington Library.

Q. Will you tell the Court why you lodged a copy of the positive prints in the Public Library and a copy in the Huntington Library?

A. It was mainly to spread the copies. If our building was destroyed, we would take the chance that perhaps one [17] copy would be preserved at the Public Library or maybe at the Huntington Library. That was further east from the coast, so we lodged one out there.

Q. Did the Public Library or the Huntington Library pay The Times-Mirror anything for the positive prints? A. No. They did not.

Q. They didn't. After you had procured the negative and your 3 positive prints, did you dispense with any of the old bound issues you say you had in two sets?

A. No. We have not.

Q. You have kept them just the same?

A. We kept them and continued to use them as we had before.

(Testimony of Harry W. Bowers.)

Q. Was this microfilming done for the purpose of conserving or preserving space?

A. No. It was not.

Q. In other words, you kept your old records just the same, in 2 sets?

A. We maintained the procedure, that is of making 2 sets.

Q. How big a space does the negative film occupy, approximately?

A. The negatives are stored in different places so they had to take about the same sized place. The dimensions of the cabinet holding the positive prints: One of them is lodged down in the editorial department. [18] The size of that film is $4\frac{1}{2}$ feet by $5\frac{1}{2}$ feet by $2\frac{1}{2}$ feet. I would judge that about $\frac{2}{3}$ of that space is now occupied with the film and that would prevail in the vault. They are the same size. That is in the Treasurer's vault, I mean.

Q. Well, was the space at that time which was occupied by these two other sets of your old issues crowded, did you need more space at that time?

Mr. Wyshak: Your Honor, I object to this line of questioning, as he has been leading the witness.

Mr. Mackay: I don't intend to lead the witness, but I think that is proper examination.

The Court: Objection overruled.

The Witness: Now, what was the question, please?

(Pending question read by the reporter.)

The Witness: Now, I want to make it clear, Mr.

(Testimony of Harry W. Bowers.)

Mackay, that I answered the question as to the space occupied by the film. Now, your question pertains to the back issues, I take it?

Mr. Mackay: That is right.

A. All right. No; the space was not nearly fully occupied.

Q. Have you estimated how long, how many more years you have before you utilize that space?

A. We have made a study of that. I would like to again [19] refer to the notes on that question.

Mr. Wyshak: Are these Mr. Bowers' notes?

Mr. Mackay: Yes.

The Witness: These are my notes, that is right. First, I will state the size of this space. I am referring to the vault that holds these back issues.

Mr. Mackay: Yes.

The Witness: It is a concrete vault and it is 26 feet by 38 by 10 feet. Now, approximately 60 per cent of that space is now holding 72 years of editions, that is, from 1881 to 1953.

Now, in my opinion we have enough space to take care of our needs for 40 to 60 years, at the present size of the paper today.

We have another avenue of increasing space, should it come about, and that is we could in the future, if we want to, eliminate one of the bound volumes. For all practical purposes we could still have a bound volume; and we have enough space there under our present practice to last for from 80 to 100 years.

Q. (By Mr. Mackay): Mr. Bowers, do you know

(Testimony of Harry W. Bowers.)

whether or not the bound volumes, the two sets of bound volumes you have talked about, have been used since you had your microfilming done?

The Witness: Have the bound volumes been used? [20]

Mr. Mackay: Yes.

A. Yes. They are used continuously, or daily I should say.

Q. And they have been ever since?

A. One edition of the bound volumes is used, that is correct.

Q. And what happens to the other edition?

A. The other edition is not used. It is filed, put away and not used.

Q. Is it sealed and wrapped up?

A. It is bound.

Q. Bound? A. Bound.

Q. Well, have the bound volumes been used any less because of the microfilming? A. No.

Q. Since the microfilming was done?

A. No; they have not. For whatever the demands are today, the same as they were prior to the filming they are still used.

Q. Well, to what extent have the positive prints, the microfilm and the positive prints been used since the print was made?

A. Well, I have been down there myself. I have talked to the custodian in charge of the film and the back issues, [21] and I have talked to the Editorial——

(Testimony of Harry W. Bowers.)

Mr. Wyshak: Your Honor, I object to this answer on the ground that it is hearsay.

The Court: It is not responsive, counsel. The objection is sustained.

Q. (By Mr. Mackay—Continuing): Do you know to what extent, of your own knowledge?

The Court: Would you rather have the question read back to him?

Mr. Mackay: Yes, I would. Will you read the question, Mr. Reporter, please.

(Pending question read by the reporter.)

Mr. Mackay: Will you answer the question, please.

The Witness: Been used?

Mr. Mackay: Yes.

A. All right. As I said a little while ago, I investigated and checked on that.

Mr. Wyshak: The same objection, your Honor.

The Court: The objection is sustained. If you know, you can answer the question. If you do not know, then just tell him you do not know.

A. From my own personal checkup, no, I do not know.

Mr. Mackay: O. K., Mr. Bowers.

Q. Now I will ask you if the microfilming of the old records was done to improve or prolong the assets of The [22] Times-Mirror Company?

A. No. They will not improve the assets or prolong them.

Q. Was it done for the purpose of increasing the circulation of The Times-Mirror?

(Testimony of Harry W. Bowers.)

Mr. Wyshak: Again, your Honor, a leading question.

The Court: Objection sustained. You have heretofore asked if he did it for any other reason. You have heretofore asked him the purpose.

Q. (By Mr. Mackay): I will ask you, Mr. Bowers, if the microfilming of the old records you have talked about here was done for any other purpose than to protect the Plaintiff and its records?

A. No. It was not.

Q. In your opinion, Mr. Bowers, did the expenditures which were made for the microfilming add to or increase the capital value of the Company?

Mr. Wyshak: If your Honor please, I object to that question on the ground that it calls for a conclusion of the witness.

Mr. Mackay: If your Honor please, the witness is a man who has had a great deal of experience, he is Comptroller of one of our large companies here, he has had public accounting experience and he is capable of answering it and, furthermore, he is an officer of the Company and has a [23] right to express his opinion.

The Court: Objection sustained.

Q. (By Mr. Mackay): I will ask you, Mr. Bowers, if any part of the costs of the microfilming was charged on the books as capital?

Mr. Wyshak: Your Honor, I object to that on the grounds it is immaterial and irrelevant.

Mr. Mackay: Oh, I don't think so.

(Testimony of Harry W. Bowers.)

The Court: Objection overruled.

A. They were not charged as capital on the records of the Company.

Q. (By Mr. Mackay): How were they charged?

A. They were charged as expense.

Q. Was that charge made under your direction as Comptroller?

A. No; I was not Comptroller in that year.

Q. You were not Comptroller, then?

A. I was the Auditor. Mr. Downing was the Comptroller.

Q. Now Mr. Bowers, what was the gross income of The Times-Mirror Company in 1943, approximately? Have you figures there showing that?

A. I have our copy of the return for that year.

Q. Yes.

A. For that year, the gross income where inventory was taken into consideration was \$10,-781,000—— [24]

Q. Just approximately ten million?

A. Ten million.

Q. Approximately what were the expenses exclusive of depreciation?

A. If I may, I prefer to refer to the certified record on that.

Q. All right.

A. I will answer the question fully and go back to it.

The gross income from all sources that year, that is, dividends, advertising and miscellaneous income,

(Testimony of Harry W. Bowers.)

was \$11,935,688.00. I will leave off the cents. And the expenses of all kinds were \$8,990,344.00.

Mr. Wyshak: Might I see the notes to which he refers?

Mr. Mackay: Surely. It is the annual report.

Mr. Wyshak: Do you have 2 copies of that?

A. This is 1944. I can get you a copy, though.

Q. (By Mr. Mackay): I think you gave the total figures for expenses. Now, how much of that was depreciation?

A. The depreciation in 1943 was \$308,278.00.

Q. And what were the corresponding figures for the year 1944?

The Witness: The corresponding figures?

Mr. Mackay: Yes, the gross income and the net income, and so forth?

A. All right; for the calendar year 1944, which is our [25] fiscal year, the gross income from all sources was \$11,539,403.00, and the expenses were \$8,768,475.00, and in those expenses is a depreciation amount of \$292,871.00.

Q. Now Mr. Bowers, you in the beginning of your testimony referred to some missing editions, of the old editions. Do you know how many? Let me ask you this:

How many pages or sheets were microfilmed, do you know?

A. Yes. Now, the pages or sheets that were microfilmed under this cost: There were 820,000 taken from the files.

(Testimony of Harry W. Bowers.)

Q. You mean from the files of The Times-Mirror?

A. From the Times files; and there were 30,579 pages that were sent in from the State of California Library at Sacramento and two other libraries, which were loaned to us and from which we made copies of them on microfilm. In other words, there was a total of 850,579 exposures.

Mr. Mackay: I think you may take the witness.

Cross Examination

Q. (By Mr. Wyshak): Mr. Bowers, for how many years have you been an accountant?

A. About 32 years.

Q. And you are familiar with the nomenclature as to the various items comprising a profit and loss statement? [26]

A. Yes.

Q. Mr. Mackay asked you as to what the gross income was for The Times for the year 1943. What was the figure which you gave him in answer to that question? Approximately.

A. Right around \$11,000,000.00.

Q. Right around \$11,000,000.00?

A. Yes.

Q. If he had asked you what the gross receipts were for that year, what would your answer have been?

A. What kind of receipts?

Q. Gross receipts as defined among accountants?

A. Well, of course, there are two. If I understand your question right—we have cash receipts

(Testimony of Harry W. Bowers.)

and we have receipts from cash and accounts receivable. I didn't know which you meant.

Q. Well, on what basis does The Times-Mirror Company keep its records, on a cash basis or on an accrual basis? A. On an accrual basis.

Q. On an accrual basis? A. Yes.

Q. In accordance with the accounting records kept by The Times-Mirror, what would have been the gross receipts for the year 1943?

A. The gross receipts?

Q. Yes. [27]

A. May I look at this record again?

Q. You may.

A. Now I will answer that question as fully as I know how. The advertising, circulation and newspaper income or revenue——

Q. No. The total gross receipts?

A. Well, that is the revenue which includes the gross receipts, cash and accrual.

Q. What is that figure?

A. \$11,935,688.00.

Q. Is that the same figure as you gave for the gross income?

A. That is the same figure, yes.

Q. It is the same figure?

A. That is right.

Q. In your mind is there a difference between the gross income and the gross receipts? As customarily used by accountants, I mean, the definition of those words?

(Testimony of Harry W. Bowers.)

A. Yes; there is. It all depends upon what kind of a statement they are preparing.

Q. Now, what is the difference between them, then?

A. Now, on a cash receipt, of course when you sell a piece of merchandise, whatever cash you get for that is a cash gross receipt.

Q. What would be the gross income with respect to that item? [28]

A. In that particular case it would be the same figure.

Now, in the net, if there was any so-called discount in connection with that transaction, that still would be deducted from that. I am not trying to be technical but that is the way we handle it down there.

Q. Could you tell us in what month and what year the microfilming was actually started?

A. Approximately. The contract was entered into in July, 1943. The work was started in about September of 1943 and was ended, as I recall it, sometime in the fall of 1944. If the record shows differently it is because I don't remember.

Q. Was the \$40,000, which was deducted on the tax return, paid in 1943?

A. The \$40,000, most of it was paid in 1943.

Q. Who was doing this microfilming?

A. I beg your pardon?

Q. Who was doing this microfilming?

A. Microstat Corporation here in Los Angeles.

(Testimony of Harry W. Bowers.)

Q. Did Microstat bill you for the work that has been done in 1943?

A. I can give you the exact amount on that.

Q. Will you do so, sir?

A. I am sorry. I thought I had it here. I still think I have it. Yes. In 1943 there was billed and paid [29] \$31,265.00.

Q. Do your books contain any item for the year 1943 which sets worth the figure \$40,000.00?

A. Yes.

Q. And what was that entry?

A. That entry was based upon 500,000 exposures at 8 cents each and setting up the expense on the accrual basis which was the original amount that was estimated to be done, and of that amount, as I stated, \$31,265.00 was paid that year.

Q. What I mean is what account was it charged to?

A. To an expense account. I don't know the correct title offhand.

Q. Was it set up as an accrued expense or was it set up as a reserve?

A. Set up as an accrued expense.

Q. How long after this paper was published did you confer with any of the Directors relative to the preservation of the Times' records?

A. As to myself I did not confer with the Directors at all. I was not an officer then.

Q. Were you a Director?

A. No. I was not.

(Testimony of Harry W. Bowers.)

Q. Well, how long after this paper was published did you take it up with anyone? [30]

A. Well, the morning that I came to the office. I testified earlier the morning I came to the office, the discussion started that morning.

Q. With whom?

A. Between Mr. Downing and myself. Mr. Downing was the Comptroller, Treasurer and Secretary of the Company at that time.

Q. Was he a Director?

A. No. He was not. And that precipitated this conversation and from that time on there was conversation back and forth with different individuals. I was not present at any of the discussions with the board of directors.

Q. Do you know if and when the Directors considered this?

A. No; I do not. I haven't a note on that.

Q. Do you know if the Directors passed on this at all?

A. I have my doubts that they did. I don't recall it being in the minutes and if they did reflect it, it is because I don't remember. I think that was a Management decision.

Q. Well, who ultimately made that decision?

A. Mr. Norman Chandler.

Q. Do you know when he came to that decision?

A. I think the decision was finally made in the spring of [31] 1944. The contract was signed in July, 1944.

Mr. Mackay: Wait a minute.

(Testimony of Harry W. Bowers.)

Mr. Wyshak: 1943?

A. 1943.

Mr. Mackay: Do you want to correct your first statement? You said "1944" then.

A. In 1943.

Q. (By Mr. Wyshak): In other words, the ultimate decision was not made until over one year had elapsed from the time the paper was published?

A. The final order of decision, yes.

Q. You say that the negative is kept in the Treasurer's vault. You are the Treasurer, are you not?

A. That is correct.

Q. Would you describe that vault for us and its location?

A. Yes. It is on the 4th floor in the Executive offices. It is a very fine structure of the No. 1 Fire—it passes what is known as I believe the Star Regulations with the Fire Board. It has a time lock. The door is I would judge maybe 12 inches thick; and it has concrete and steel walls—a very substantial vault.

Q. Then, you would consider it bombproof and fireproof?

A. I don't know as I could answer that question. I don't know. If I may elaborate on my statement—

Q. Would you, please? [32]

A. I have seen the results of bombings. I think that I am one of the employees of The Times-Mirror Company that has had occasion to check into the records of the early bombing, that is the bombing in 1910, and I have had occasion to see some of the

(Testimony of Harry W. Bowers.)

results in London and in Germany of bombing there of records and of buildings, and still I don't know whether that safe would go through a bombing. I don't know. I believe it would.

Q. Is it airconditioned?

A. Airconditioned, yes.

Q. Does anyone else besides The Times-Mirror, the Huntington Library and the Los Angeles Library have a positive print of these back issues of The Times?

Mr. Mackay: You mean at the present time?

Mr. Wyshak: Yes.

A. If any other depositary has it?

Q. Does anyone? Are only those 3 prints in existence?

A. No, no. There are other prints in existence.

Q. And who has those other positive prints?

A. Well, I have a list of them. I will read it off to you.

Q. Will you please, sir?

A. Now, I would like to make this statement: This is a letter from The Microfilm Corporation of California. We have nothing to do with the printing made from the negatives, [33] and here is their letter.

Q. May I ask, you mean you yourself do not have anything to do with that?

A. That is right, we do not have anything to do with that.

(Reading from letter:)

The California State Library at Sacramento,

(Testimony of Harry W. Bowers.)

The Stanford University, Stanford, California, The Pomona Public Library, Pomona, California, The San Diego Public Library, at San Diego, California, The Claremont College, at Claremont, California, The University of California, at Berkeley, California, The Midwest Inter-Library Center, Chicago, Illinois, The Library of Congress at Washington, D. C., The State College of Washington, Pullman, Washington,

and the University of Missouri has a microfilm of the Times from 1881 to 1948.

Q. Did these colleges ask the Times for these positive prints?

A. No. The ones that I definitely know about, no. The ones I know about solicited the Microstat Company. They in turn then contacted us as to whether we will give them a permit to use the negatives.

Q. Has the Times ever refused to let anyone have a positive? [34]

A. No, not that I know of.

Q. In other words, the Times would consider it a public service? A. That is correct.

Q. And also in the form of advertising, for these libraries, Colleges and Universities to have copies of the Times?

A. In the form of advertising?

Q. What I mean is to give the Times more notoriety, so to speak, so that if anyone would want

(Testimony of Harry W. Bowers.)

to refer to a past event he would be directed to the Times?

A. Well, I never understood it in that way, no. I take it, regarding these institutions like the State Library at Sacramento, the Library of Congress in Washington, D. C. and these other institutions, in my understanding it is for historical purposes.

Q. It does help the public relations, does it not, and establishes prestige for the Times to have these prints in the various libraries and colleges?

A. As to the prestige of the Times, is that the question?

Q. And also helps public relations?

A. In the same category that we publish a newspaper, yes.

Q. I believe you said that the one positive that the Times has is kept in the Editorial department?

A. Yes.

Q. On the 4th floor? [35]

A. No. On the third floor.

Q. On the third floor? A. Yes.

Q. Under what conditions is it kept there?

A. It is on the outside of a large vault, just along the wall, like any other file.

Q. Is there a custodian of those films there?

A. Yes.

Q. How many viewing machines do you have there? A. One.

Q. How far away is this positive print from the room where the bound volumes are kept?

A. I don't think it is over 10 feet from where

(Testimony of Harry W. Bowers.)

the film is lodged in this file to the entrance of the vault.

Q. To amplify your answer to that question, you meant the vault where the bound volumes are kept?

A. Yes; that is right.

Q. Are those papers prior to the bombing in 1910 which are kept in the bound volumes referred to at all?

A. Occasionally, yes.

Q. What is the condition of the negative which is kept in the Treasurer's vault as of today, if you know it?

A. In good condition.

Q. Would you say that it is just as good as the day it was made? [36]

Mr. Mackay: I will stipulate.

Mr. Wyshak: Will you also stipulate the same as to the condition of the positive?

Mr. Mackay: Yes.

Mr. Wyshak: "Yes?"

Mr. Mackay: Yes.

Q. (By Mr. Wyshak): If I should go to the Times and ask for a copy of a newspaper published in 1913, would I be provided with a copy of a micro-film of the newspaper for that date, or a copy of the paper itself?

A. In 1913?

Q. Yes.

A. May I look at the record on that?

Q. Yes.

A. And see what the condition of it was.

Q. I don't believe that you mentioned the year 1913 in the years that you enumerated.

(Testimony of Harry W. Bowers.)

A. In 1913, the volumes are in good order there; yes, you would get a copy of it.

Q. Pursuing my last question, Mr. Bowers, would the copy you sold to me be a copy of the bound volume edition or of the microfilm?

A. In the year 1913?

Q. Yes.

A. You would be shown a copy of the bound volume. [37]

Q. What I mean is, if I wanted a copy of it, would I be given a copy printed from the microfilm, or would a photograph be taken of the bound volume edition?

A. You mean to look at it, I take it?

Q. No. I mean to take it with me?

A. You couldn't take that with you. You could not take it with you.

Q. The Times would not make a copy of that for me? A. Make a copy for you?

Q. Yes.

A. No. They would not. If you wanted a copy to use elsewhere than in the Building, you would be directed to the Public Library.

Q. No. What I mean is, supposing I would want a copy of a certain edition—— A. Yes.

Q. ——would I be given a copy made from the microfilm or a copy made from the bound volume?

A. I don't quite get your question? When you want a copy, if I answer according to my understanding——

The Court: I don't think you have made your-

(Testimony of Harry W. Bowers.)

self very clear. I think the first question you should ask him is whether it would be possible to purchase a copy. That is the first question.

Q. (By Mr. Wyshak): Would it be possible for me to purchase [38] a photostatic or a photographic copy of an old edition from the Times?

A. A photostatic copy?

Q. Or a photographic copy or reproduced by any process?

A. If you wanted a copy of an edition in photostat form, we would direct you to the Microstat Company and they would get it for you undoubtedly.

Q. Supposing an employee of the Times for one reason or other wanted a reproduction of an old edition, would that reproduction be made from the bound volume or from the microfilm?

A. It would be in the same classification. It would be cheaper to go to the Microfilm people or the Microstat people and get a copy of it.

Q. It would be made from the microfilm, then?

A. That is right.

Q. I believe you stated that the purpose of the microfilming was to avert a bombing result or to safeguard having copies of the Times in the event of a bombing?

A. To preserve those records, yes.

Q. That would mean a bombing by anyone, would it not, not merely by the foreign power that was referred to in this edition (Indicating)?

A. The decision that was made upon this micro-

(Testimony of Harry W. Bowers.)

filming was based upon what I refer to as a war bombing, like [39] what happened that morning.

Q. Was it not feared that there might be another bombing caused by some sort of civilian disturbance?

A. I have never heard that discussed in the light of your question.

Q. Has the Times microfilmed any of their other records?

A. No. We have not.

Q. Do you know what the rag content, if any, is of the newspapers?

A. The rag content?

Q. Yes, of the paper on which the Times is printed?

A. I don't think I am qualified to go into that, sir. No, I do not.

Q. You do not know?

A. That is right.

Q. Regarding any of those early newspapers which were not affected by fire or water resulting from the 1910 bombing, have any of them reached such a condition that they cannot be referred to?

A. Those that were not offered by the 1910 bombing are usable and are referred to.

The Court: We will take a five minute recess.

(Forenoon recess.)

The Court: You may proceed. [40]

Q. (By Mr. Wyshak): At the time you decided to microfilm those old newspapers, wasn't one consideration that sooner or later the paper itself would wear out or decay?

(Testimony of Harry W. Bowers.)

A. No. I never heard that discussed and I will tell you why it wouldn't be discussed. There is the second volume.

Mr. Wyshak: I haven't asked you that.

Mr. Mackay: Let him explain his answer.

The Court: He can explain his answer.

A. I will tell you why. We have 2 volumes here. One of the volumes is not used.

The Court: Don't tell us why. That isn't an explanation of the answer.

A. It just doesn't deteriorate in the unused volume to any great extent.

Q. (By Mr. Wyshak): But in time it will deteriorate, sooner or later?

A. In a long period of time, I would say it would.

Q. It would?

A. In a long period of time.

Q. Directing your attention to my previous question about an employee of the Times desiring a reproduction of an old edition, what I meant was if the employee needed it for his work, would he still be directed to this microfilming company that you referred to, to get a copy? [41]

A. If he needed to refer to an old copy? I don't quite get what you mean there now.

Q. Supposing an employee of the Times were going to go to China or to some foreign country and for some reason or other he needed a reproduction of an old edition of the Times and he was going to the foreign country in the course of his

(Testimony of Harry W. Bowers.)

employment, would he still be directed to the Microstat Company to obtain that copy?

A. For that case, I would say no. We would use the same method we did here—a photostat copy.

Q. Well, under what circumstances would he be directed to the microfilming company to get a copy?

A. As I understood your question, if he just wanted a page copy and not a full edition——

Q. Supposing he wanted a full edition?

A. If he is directed to go to China, as you said, we would give him a photostatic copy.

Q. Well, I asked you under what conditions would he be directed to the microfilming company?

A. Under what conditions would he be directed to the microfilming company?

Q. Yes.

A. In that case I could visualize this. I don't know of any where it has been done. We are not set up to furnish copies to anybody who comes in, employees included. We [42] would give him a copy of a back issue in the way I have stated. If someone came in or if an employee for his own personal reason wanted a copy of an edition, we are not set up to furnish it. We send him down to the Microstat Company, he would get permission to use the film, and that would apply to an employee as well as to an outside individual.

Q. Is this microfilming company in any way connected with the Times? A. No, no.

Q. They do, however, have a negative, a copy of the negative copy which you have?

(Testimony of Harry W. Bowers.)

A. Do they have?

Q. Yes.

A. I doubt it very much. When they make a copy, when they make a print, they come and borrow ours, so I don't know.

Q. Whenever any reproduction is made from the negative, your negative is used?

A. That is correct, so far as I know.

Q. Did you ever confer with Mr. Chandler to aid him in his determination to have these microfilms made?

A. Me?

Q. Yes.

A. No. I did not, no. All my discussion was with my [43] immediate superior.

Mr. Wyshak: Your Honor, I move to strike all the witness' testimony touching on the reason for the microfilming of the records, on the grounds that it is hearsay, incompetent and immaterial.

The Court: Denied.

Mr. Mackay: Are you through on *direct*?

Mr. Wyshak: Yes.

Redirect Examination

Q. (By Mr. Mackay): Mr. Bowers, I think you were asked about how much The Times-Mirror was billed for the microfilming in 1943 and I think you testified it was about \$31,000.00, as I recall. Will you tell the court if during the next 60 days, the early 60 days in 1944, you had other billings from the Microstat Company?

A. Yes.

Q. How much was it then?

(Testimony of Harry W. Bowers.)

A. I will look at the record on that. I stated that we paid \$31,265.00 in 1943. And in the first 60 days in 1944 we paid \$14,895.00.

Q. I think you stated that a number of Universities had procured a positive of the microfilm of the Times back issues? A. Yes. [44]

Q. Will you tell the court whether the Times sought them out to get those positives of its old issues? A. Sought them out?

Q. Yes.

A. No; they did not. From any knowledge I have, they did not.

Q. Well, how would they come about to get that?

A. I don't know what would——

Mr. Mackay: I will withdraw that.

Q. Can you tell me, when these Universities you spoke about obtained their film, was it in 1943 or 1944?

A. I don't know whether I have the dates on that. That was spread out over a period of time. This was not all done at one time. It was done over a period of time of 4 or 5 years.

Q. Well, does The Times-Mirror pay for any of the cost of supplying these Universities with a positive film? A. No. They did not.

Q. That is borne by the Universities themselves?

A. As far as I know. It wasn't by us.

Q. I beg your pardon?

A. It was not by us.

Q. Now, Mr. Bowers, why was there delay be-

(Testimony of Harry W. Bowers.)

tween about February, 1942 and the next year, in having the microfilming done, if you know? [45]

A. Well, that was a new procedure—new to us. There wasn't a great deal of experience to draw upon. It is my understanding that the microfilming procedure——

Mr. Wyshak: Your Honor, I object to the witness' answer, on the ground that it is based on hearsay. He has already testified that he did not confer with Mr. Chandler with whom the ultimate decision rested.

Mr. Mackay: Well, this man who is the Comptroller certainly would know what the condition of the microfilming was at that time.

Mr. Wyshak: He wasn't Comptroller at that time.

Mr. Mackay: I don't care whether he was Comptroller then or not. He was there. And everyone knows that the War was on and they couldn't get help or anything else and we also know that the films were scarce. I don't understand the objection, your Honor.

The Court: I don't understand whether you are objecting to the question or whether you are objecting to the answer.

Mr. Wyshak: I am objecting, your Honor——

The Court: On what grounds?

Mr. Wyshak: On the grounds that it is hearsay and incompetent, and on the further ground that the witness has already testified that he did not

(Testimony of Harry W. Bowers.)

confer with Mr. Chandler with whom the ultimate decision to microfilm rested. [46]

The Court: Objection overruled.

Mr. Mackay: Read the question, please.

The Court: Read the question to the witness.

(Pending question read.)

A. As I started out to say—I will preface my remark with this: I was sitting then with Mr. Downing as an assistant, I was the Auditor, and he was Comptroller, Treasurer and Secretary of the Company, and discussion was borne or this idea started the morning of this raid and there was no experience from my side or from Mr. Downing's side with the microfilming of back issues, as far as we knew, and there was no basis early to such experiences.

Mr. Wyshak: I move to strike this answer as not responsive.

The Court: It may go out on that ground, that it is not responsive. Read the question to him again. Just answer the question, if you can answer it.

(Pending question re-read as follows: "Q. Now Mr. Bowers, why was there delay between about February, 1942 and the next year, in having the microfilming done, if you know?")

A. From my knowledge the delay was due to gathering of information on how it was to be done and the difficulties that we would have to surmount in doing the work. It took [47] considerable amount of time to explore that.

Q. (By Mr. Mackay): Well, what particular

(Testimony of Harry W. Bowers.)

difficulty did you encounter and with respect to the ability of somebody to go ahead and microfilm at that time?

A. Lack of experience, the exchange of experiences with competition.

Mr. Wyshak: Your Honor, I move to strike that answer as not responsive.

The Court: Overruled.

Q. (By Mr. Mackay): Well, had you discussed this with any film company or anybody else in that business, to find out whether or not they could undertake such a job?

A. We eventually got to discussing this with the Microstat Company, that is true.

Q. Had you discussed it with anybody else besides Microstat Company at that time or prior to that time?

A. I recall Mr. Downing discussing this with a representative of Eastman Kodak Company, the local representative.

Q. And had they proposed a plan of micro-filming?

A. They didn't propose a plan. They just told how it was to be done that seemed to be practical from their point of view.

Q. And what did they say with respect to how it should be done? [48]

A. Well, the difficulty there was that they were not set up to handle the job, at that time, of our kind. Their microfilming, as I recall it, was confined to people sending the issues to I believe Roch-

(Testimony of Harry W. Bowers.)

ester and they would microfilm them and send them back.

Mr. Wyshak: Your Honor, I move that answer go out as hearsay.

The Court: It is not responsive. You could object as soon as he starts answering, when we have three words out of his mouth, when you know it is not responsive. That is when you should make your objection in that instance. Objection sustained. Read the question to him.

(Pending question read as follows: "And what did they say with respect to how it should be done?")

The Court: That is very simple. All it asks is what did they say?

Mr. Mackay: That is right. In substance?

A. That to do a job of this size at long range was a difficult job and would have to be studied.

The Court: That is what they said?

A. That is the substance of what they said, yes.

Q. (By Mr. Mackay): Is that all they said?

A. No. Then they explained how they handled the microfilming of current issues and the problem of how they [49] would have to do it out here in Los Angeles for us, and the answer was that they would have to make a special setup.

Q. Just a minute. I will ask you, Mr. Bowers, and I think I asked you this once before, if The Times-Mirror bore any of the cost——

A. I didn't get that?

Q. I think I asked you a while ago whether

(Testimony of Harry W. Bowers.)

The Times-Mirror stood any of the cost of these Universities and Libraries getting the prints?

A. No. We did not.

Q. Except the Huntington and the Public Libraries here.

A. In those two instances.

Q. And I think your answer was "No"?

A. That is correct.

Q. Did the Times-Mirror receive any compensation for permitting the microfilming company to use the negatives?

A. No, sir.

Q. For any of those prints?

A. No. They did not.

Mr. Mackay: I think that is all.

Recross Examination

Q. (By Mr. Wyshak): Has the Huntington Library or the Los Angeles Library [50] received any positive microfilm subsequent to the time they originally got the positives?

A. Subsequent to that?

Q. Yes, subsequent?

A. Yes, they did.

Q. Did the Huntington Library receive positive prints of the current editions?

A. That is correct.

Mr. Wyshak: That is all.

The Court: I understand from your last statement there that the positive prints were first received by them in 1943 and then ever since that time, when the current issues were microfilmed, positive prints were sent to these libraries?

(Testimony of Harry W. Bowers.)

A. That is correct.

Redirect Examination

Q. (By Mr. Mackay): I would like to ask you, Mr. Bowers, about these current microfilmings; how often is that done?

A. Once a month.

Q. Once a month?

A. That is right.

Mr. Mackay: That is all.

I would like to call Mr. Carraro. [51]

ROMEO CARRARO

called as a witness herein on behalf of the plaintiff, being first duly sworn, was examined and testified as follows, to-wit:

The Clerk: Your full name, please?

A. Romero Carraro.

Direct Examination

Q. (By Mr. Mackay): Mr. Carraro, where do you live?

A. I live at 10402 Nevill Avenue, Downey.

Q. What is your occupation?

A. I am Chief Librarian of the Los Angeles Times.

Q. And how long have you been Chief Librarian of the Los Angeles Times?

A. Since September 2nd, 1945.

Q. And as Chief Librarian, tell me just what you are in charge of?

A. I am in charge of what is known in newspaper parlance as the Morgue, now called the ref-

(Testimony of Romeo Carraro.)

erence room, in which you will find an index to the Los Angeles Times and the bound volumes of the Los Angeles Times, plus our added microfilm file.

Q. Do you have charge of the negative of the microfilm that we have been talking about?

A. No. I have charge of the positive. [52]

Q. Of the positive? A. That is right.

Q. And are you in a position to tell to what extent it has been used? A. Yes, I am.

Q. To what extent has the positive print been used, Mr. Carraro?

A. As far as the Times' personal business, two men have used the positive file, the positive microfilm file in the library. One was the late Col. Cleve Jones. The other man is Ed Krauss, of our editorial department, for our little article that we run on our editorial page. They used it for approximately a period of less than 2 years, and at that time, when they were using it, they probably used it from 2 to 3 times a week. And I have used it myself to answer letters or inquiries from the public anywhere from 2 to 6 times a year.

Q. Is that the extent to which that is used?

A. That is the extent to which that is used. We don't use the microfilm——

Mr. Wyshak: I move to strike that out as not responsive to any question.

The Court: You mean this last?

Mr. Wyshak: Yes.

The Court: It is a volunteered statement. [53]

Mr. Wyshak: Yes, it is.

(Testimony of Romeo Carraro.)

The Court: Starting with "We don't use".

Mr. Wyshak: That is right.

The Court: Wait for another question.

Q. (By Mr. Mackay): Who turns on the micro-filming viewing machine if it is to be used by either one of the two gentlemen you have been talking about?

A. Either myself or one of my assistants.

Q. Does The Times-Mirror have any facilities for making reproductions from the positive film?

A. No. We do not.

Q. And therefore, are any reproductions made from the positive film by The Times?

A. No.

Q. Supposing that somebody wants a reproduction from the positive?

A. The only reproduction we can make is from our bound volumes.

Mr. Wyshak: I move to strike that as not responsive.

Mr. Mackay: I think that is responsive.

The Court: Overruled.

A. The only reproduction we can make is from our bound volumes, and we will make a photostatic copy from the bound volume only.

Mr. Mackay: Well, you speak about those two gentlemen, [54] Mr. Krauss, and what was the other gentleman's name?

A. The late Col. Cleve Jones.

Q. Yes. And why would it be necessary to use the positive film?

(Testimony of Romeo Carraro.)

A. Well, they used the positive film for the years that we do not have a bound volume for and we were able to secure the papers from the Bancroft, the State Library or other libraries in which they are microfilmed.

Q. Can you tell the court when they used that?

A. They used that in about 1948 and 1949.

Q. Have they used it since that time?

A. They have not.

Q. Are the bound volumes used by the reporters and editorial staff? A. Yes, they are.

Q. Do you have any complaints from anybody when they use the microfilm?

Mr. Wyshak: Your Honor, I object to that for the reason that that is immaterial and irrelevant.

The Court: Overruled.

A. Well, I complain about it myself, because reading the microfilm is a very tedious job and you cannot do it for a period of longer than ten minutes at a time without resting. Mr. Krauss also complained for that same reason.

Mr. Mackay: You may take the witness. You may cross [55] examine.

Cross Examination

Q. (By Mr. Wyshak): Did I understand you to state that Mr. Krauss used the microfilm in connection with his editorial writing, is that correct?

A. Not his editorial writing. In connection with a column, that was used, of happenings of years gone by.

(Testimony of Romeo Carraro.)

Q. It was published in the current editions?

A. It was published in the current editions, that is right.

Q. Did I further understand you to state that the Times does not have a complete library of the newspapers themselves from the time that they started publishing?

A. Yes. We do not have a complete file of the Los Angeles Times from its inception.

Q. And that the papers that are missing are borrowed from other libraries or Universities in order to have them microfilmed?

A. That is correct.

Q. In other words, you have a complete file in microfilm?

A. We do not have a complete file in microfilm. There is still a great number of missing copies.

Q. Are those papers missing as a result of deterioration or some sort of damage? [56]

A. The files that are missing are probably missing because of the cause of the bombing.

Q. And you were not able to have the missing copies microfilmed by securing them from other sources?

A. We have not been able to secure the missing copies. We are still hunting for them.

Mr. Wyshak: That is all.

Mr. Mackay: That is all. I will call Mr. Krauss.

EDWARD C. KRAUSS

called as a witness herein on behalf of the plaintiff, being first duly sworn, was examined and testified as follows, to-wit:

The Clerk: Your name, please?

A. Edward C. Krauss.

Direct Examination

Q. (By Mr. Mackay): Mr. Krauss, where do you live or reside?

A. I reside at 4022 Cromwell Avenue.

Q. What is your occupation?

A. I am an editorial writer.

Q. An editorial writer? A. Yes.

Q. For whom?

A. For the Los Angeles Times.

Q. How long have you been an editorial writer for the [57] Los Angeles Times?

A. Since about the first of 1928.

Q. And what is your particular aspect of editorial writing?

A. Well, I write any editorials that are assigned to me to write. I do not have any particular field.

The Court: Keep your voice up, Mr. Krauss.

Mr. Wyshak: I can't hear the witness.

Mr. Mackay: Counsel cannot hear you. Would you please speak a little louder?

The Witness: Surely. I will try to.

Q. (By Mr. Mackay): Mr. Krauss, have you had occasion to use the positive microfilm of the old records of the Times-Mirror?

(Testimony of Edward C. Krauss.)

A. I did for a short time, yes, for something less than 2 years.

Q. For what period of time?

A. It was during the years 1949 and 1950 that I used it.

Q. And what was the occasion, then?

A. The occasion was that it was for the purpose of making up what we call "Yesteryear" in the Times, or I think that is the title of it.

Q. Is this it, to refresh your recollection (Showing document to the witness)?

A. "In Other Times". It has been given different titles at various times. [58]

Mr. Mackay: I should like to offer this in evidence, if your Honor please.

Mr. Wyshak: Your Honor, I believe that it is immaterial and irrelevant, and I object on that ground.

Mr. Mackay: Well, it is not too important.

The Court: You do not object on the grounds of lack of foundation, do you?

Mr. Wyshak: No.

The Court: The objection is overruled.

The Clerk: Exhibit No. 4 in evidence.

The Court: It is a question of the weight.

(Said document, so offered and received in evidence, was marked as Plaintiff's Exhibit No. 4 in evidence.)

Q. (By Mr. Mackay): Now will you please explain the occasion for which you used the film?

A. I used the film when the bound volumes were

(Testimony of Edward C. Krauss.)

not available, for the purpose of obtaining the notes for making up this photo that we use, of reprints from the back issues.

Q. Why did you not use it after 1950?

A. I used the film for 1950 because the bound volumes were not available for the year we were doing. We were doing at that time 60 years——

Q. Oh, 60 years prior, you mean?

A. 60 years prior, and that would be 1890, and the bound volumes of 1890 were not available. [59]

Q. Have you had occasion to use the microfilm since 1950? A. No, sir.

Q. Have you had occasion to use the bound volumes? A. Once in a while, yes.

Q. On what occasion did you use them?

A. I am still preparing this on an every other month basis. We divide the work.

Q. Do you find difficulty in using the microfilm?

A. Yes, a great deal.

Q. Why did they drop from 60 to 50 years ago in that little column you write?

A. They dropped because we were informed that the files were very incomplete for several years after 1890, so we shifted from 60 years ago to 50 years ago in order to skip those 10 years where part of the files would be incomplete.

Q. Mr. Krauss, is the microfilm, the positive film always clear? A. No. It is not.

Q. In what respect is it not?

A. Well, when they photographed it they did not break down the binding so that the gutter of

(Testimony of Edward C. Krauss.)

the edge of the page, the inside edge of the page is curved and that does not photograph distinctly and you can't read it, very often.

Mr. Mackay: Thank you. That is all. [60]

Cross Examination

Q. (By Mr. Wyshak): Mr. Krauss, have you ever used any other machine to look at microfilm?

A. No.

Q. At another plant, other than the Times has?

A. No. I have never seen any other one except the one of the Times.

Mr. Wyshak: No further questions.

Mr. Mackay: I think that is all, Mr. Krauss.

If your Honor please, that concludes the Plaintiff's case.

I move for judgment, on the record.

The Clerk: Do you rest?

Mr. Mackay: We rest.

(Whereupon the Plaintiff rested its case in chief.)

(Thereupon the Defendant, to maintain the issues on its behalf, offered and introduced the following evidence, to-wit:)

Mr. Wyshak: Mr. Macartney.

FRED L. MACARTNEY

called as a witness herein on behalf of the Defendant, being first duly sworn, testified as follows, to-wit:

The Clerk: Your full name, please?

A. Fred L. Macartney. [61]

Direct Examination

Q. (By Mr. Wyshak): Where do you live, Mr. Macartney?

A. I am residing at 512 West Grand, San Gabriel.

Q. And where are you employed?

A. In the Los Angeles Office of the Bureau of Internal Revenue.

Q. As a revenue agent?

A. As a revenue agent.

Q. And are you the agent who worked on the instant case? A. I am one of the agents.

Q. I believe you heard Mr. Bowers testify regarding the accounting entry relative to the \$40,000.00 that was set up on the books as an approved expense? A. Yes.

Q. You did? Would you please say "Yes" so we can hear you. A. I heard his reply.

Q. Did you examine the records, the accounting records of the Los Angeles Times for the year 1943 in the course of your audit?

A. No, I didn't make the audit, for the year 1943. I handled the subsequent case on that year.

Q. For the year 1943?

A. Yes. Can I explain how it was done?

(Testimony of Fred L. Macartney.)

Mr. Mackay: I object to such explanation, if your Honor [62] please.

The Court: Wait for another question. Go ahead.

Q. (By Mr. Wyshak): Did you examine the records for the year 1943 at any time?

A. I did not.

Q. You did not. Did you examine any of the closing or adjusting entries for that year?

A. I did not.

Q. Whom did you speak to at the Times regarding the use to which this microfilm is put?

Mr. Mackay: Well, I object to that, if your Honor please. In the first place, whom did he speak to is a leading question. He said he did not examine it for these years. It is incompetent.

Q. (By Mr. Wyshak): Did you speak to anyone?

The Court: Objection overruled. It is a preliminary question. If you are having difficulty, do you want to talk to your witness?

Mr. Wyshak: Just a moment.

The Court: Go ahead, then. It is a preliminary question, I assume.

A. Mr. "Carroll" I believe.

Q. (By Mr. Mackay: Mr. Carraro?

A. Carraro, this gentleman (Indicating), in connection with the microfilm in the vault. [63]

Q. (By Mr. Wyshak): And when did you speak to Mr. Carraro?

A. About the 1st of August, 1950.

(Testimony of Fred L. Macartney.)

Q. Was there any conversation between you relative to the use to which the microfilm was put?

A. Yes. I questioned him as to the use and I recorded his explanation to me.

Q. What use did he tell you it was put to?

Mr. Mackay: I object to that, if your Honor please. If this is offered for impeachment purposes, there is no foundation.

The Court: Is this for the purpose of impeachment, counsel?

Mr. Wyshak: Not for impeachment, your Honor, but to amplify what Mr. Carraro told him.

Mr. Mackay: I think it is entirely incompetent. It was in 1950 and it has nothing to do with it.

The Court: Counsel, Mr. Carraro has testified, but if it is for the purpose of impeachment, of course you may inquire, but lay a foundation of time, place and persons present.

Q. (By Mr. Wyshak): Well, at the time you spoke to Mr. Carraro, who was present?

A. Mr. Bowers and Mr. Mackay, and Mr. Bohler of our office.

Q. Where did this conversation take place? [64]

A. In the Morgue, what is known as the Morgue.

Q. In the Morgue?

A. In the vault where the newspapers are kept and just outside of the vault, where the microfilm was.

Q. When was this conversation?

A. July and August of 1950.

Q. Could you tell us in substance what Mr. Car-

(Testimony of Fred L. Macartney.)

raro said relative to the use to which the microfilm was put?

Mr. Mackay: I object to that, if your Honor please. I don't understand the purpose of this. Is it for impeachment?

Mr. Wyshak: It is.

Mr. Mackay: Then, if your Honor please, there is no foundation laid at all for it. I object to it. The witness is here and he has had the chance to lay a foundation if he wanted to do so. He didn't do so. He told the court a moment ago that it wasn't for impeachment and that now it is. I object.

The Court: Objection sustained.

Q. (By Mr. Wyshak): At that time was Mr. Carraro the Chief Librarian as he is now?

A. I believe he was introduced to me as such. He was in charge of that department.

Mr. Wyshak: Your Honor, I should like to introduce the content of Mr. Carraro's statement to Mr. Macartney as a [65] vicarious admission.

Q. Did Mr. Carraro make any statement to you regarding the use to which this microfilm was put?

Mr. Mackay: I object to that for the same reasons I have heretofore objected, if your Honor please.

The Court: The objection is overruled.

A. Yes. I questioned as to how the film was used and how the bound volumes were used, both of which I was shown.

Q. (By Mr. Wyshak): What did he tell you with respect to the use of the microfilm?

(Testimony of Fred L. Macartney.)

Mr. Mackay: I object to that for the same reason, if your Honor please. The witness has been here before the court and no foundation has been laid.

The Court: The objection is sustained. There is no foundation laid. You have had an opportunity to lay a foundation and no foundation has been laid for the purposes of impeachment. I don't know whether you are referring to the same conversation as a foundation. There isn't any way for me to tell whether you are referring to the same conversation, the same statements or not now.

Q. (By Mr. Wyshak): Well, at the time you conversed with the gentlemen whom you stated were present on that date in July, of what year was it——

A. 1950.

Q. ——did Mr. Carraro make a statement to you regarding [66] the use to which the microfilm was put?

A. Yes.

Q. And what was that statement?

Mr. Mackay: I object for the same reason as heretofore. He hasn't laid a foundation for impeachment purposes and it is entirely incompetent, irrelevant and immaterial.

Mr. Wyshak: Your Honor, I am also offering it as a vicarious admission.

The Court: Counsel, if it is for the purposes of an admission, there isn't any showing that Mr. Carraro is an officer of the Times corporation. As an employee of the Times corporation, there is no showing that he would be bound by the statements

(Testimony of Fred L. Macartney.)

or that the plaintiff here would be bound by his statements.

Mr. Wyshak: If your Honor please, I believe that the Treasurer of the Corporation was present at that time. Mr. Bowers was present and any statements made by Mr. Carraro which were incorrect I am sure would have been corrected by Mr. Bowers at that time, and I submit that the plaintiff is bound, therefore, by the witness' admissions in the presence of the officer.

The Court: Counsel, there isn't any showing that he was present at all.

Mr. Wyshak: If your Honor please, I believe that the witness has testified that Mr. Mackay, Mr. Carraro, Mr. [67] Bowers and someone else were present at the time this conversation took place.

The Court: Well, read his testimony with respect to that.

(Record read by the reporter.)

The Court: Now, with respect to admission, how would the testimony of Mr. Carraro be binding on the Corporation? On what theory would you figure that his testimony would be binding on it as an admission of the Corporation?

Mr. Wyshak: I felt quite certain I asked him the question who was present. The Treasurer of the Corporation was present.

The Court: What difference does it make if the Treasurer of the Corporation was present, if he didn't participate in the conversation? In other words, there wasn't an admission.

(Testimony of Fred L. Macartney.)

Mr. Wyshak: But the Corporation has to act through agents and I think it would be an implied admission on his part if an agent of the Corporation is making statements regarding the action of the Corporation, and I think he would be under a duty to correct any misstatements.

The Court: Well, we will recess now until 2:00 p.m. When you come back, if you are offering this for the purpose of impeachment, you will be permitted to lay a foundation at that time. [68]

Mr. Wyshak: And also for the purpose of the other matter stated.

The Court: What is that?

Mr. Wyshak: And also as an admission.

The Court: Well, we will rule on it at the time you come back.

(Whereupon a recess was taken until 2:00 p.m. of the same day, Thursday, June 17, 1954.)

Los Angeles, Thursday, June 17, 1954, 2:00 p.m.

Trial resumed pursuant to noon recess.

Present: Same as before.

Mr. Wyshak: May we proceed, your Honor?

The Court: All right, you may proceed.

Mr. Wyshak: Your Honor, to clarify this matter of the bound volumes, we have stipulated that with respect to all years prior to October, 1910, when the bombing took place, there is only the one bound set and for years subsequent thereto there are two bound sets.

Mr. Mackay: That is right, your Honor.

Mr. Wyshak: And I would like to put Mr. McCartney back on the stand.

The Court: Prior to 1910 there is one bound volume from 1883, is that right?

Mr. Mackay: From 1881, your Honor.

The Court: From 1881 to 1910, there is one bound volume?

Mr. Mackay: That is right.

Mr. Wyshak: That is right.

The Court: I understand the testimony to be, however, that in some cases there are some missing.

Mr. Mackay: That is quite true, your Honor. There may be a whole year missing and then even in the bound volume [70] there may be certain editions, certain issues missing.

The Court: All right.

Mr. Wyshak: And I believe there was some testimony that with respect to some of those where the newspapers are missing they do have microfilm.

Mr. Mackay: As to some of them only, that is right.

The Court: According to some of the testimony that has gone in now, of course there are some of those papers that are missing and they had microfilms of all of those that the Times has. They have supplemented those by some that they have received from libraries and private parties, that they have borrowed and microfilmed.

Mr. Mackay: Yes, sir.

Mr. Wyshak: That is correct, your Honor.

The Court: So that they have some microfilms of some that they do not have the originals of.

Mr. Wyshak: That is correct, your Honor.

The Court: And in addition to that, there are some of which they neither have the originals of nor do they have a microfilm of them, because they have not been able to locate them.

Mr. Mackay: That is correct.

Mr. Wyshak: That is correct, your Honor.

Mr. Macartney. [71]

FRED L. MACARTNEY

resumed the witness stand on behalf of the defendant, having been previously duly sworn, was examined and testified further as follows, to-wit:

Direct Examination—(Continued)

Q. (By Mr. Wyshak): Mr. Macartney, directing your attention to that day to which we referred, in July, 1950, when you went to the Times Building, I believe you stated that you went to Mr. Bowers' office?

A. I did.

Q. And to whom did you speak, then?

A. Mr. Mackay and Mr. Bowers. I was with Internal Revenue Agent Bohler. We were representing the Government. There were Mr. Mackay and one assistant from his office, and Mr. Bowers and two of his assistants not including the Librarian.

Q. And what did Mr. Bowers say to you with respect to the microfilm?

Mr. Mackay: If your Honor please, I object to

(Testimony of Fred L. Macartney.)

it on the ground it is improper. There is no foundation for impeachment laid.

I want to say this for the record: If counsel thinks there is any misunderstanding in respect to any fact, I would have no objection and I would be very happy [72] to recall the Chief Librarian here for him to lay any foundation that he wants to. He had the opportunity once. I do not object to him taking it again. I am just as anxious to get this cleared up. I think there is no real difference between us, but I would like to see it done in the right way.

The Court: Well, I have tried to be as helpful as possible. I have not been able to determine what counsel is attempting to prove. I have inquired as to whether or not it was for the purpose of impeachment, and after the objection I even went so far as to state that I would permit you to lay a foundation, if it is for impeachment, to put the witness back on the stand, because no foundation has been laid. It was Mr. Carraro whose statements you were referring to in your interrogation of this witness before and now it is Mr. Bowers. Now of course if it is for impeachment, if there were contradictory statements, then you may lay a foundation, by calling the witness, either Mr. Carraro or Mr. Bowers, or both, as the case may be, and lay your foundation. If it isn't, then I would like to know on what ground you are offering it. The evidence, of course, ordinarily is hearsay, so we start with that. Now, you tell me under what

(Testimony of Fred L. Macartney.)

exception to the hearsay rule you are attempting to put this evidence in. [73]

Mr. Wyshak: Your Honor, I should like to introduce this evidence for two purposes: One is an implied or adopted admission and secondly to impeach Mr. Carraro.

The Court: Well, as I stated, you can't impeach a witness without first confronting him with the statement and laying a foundation of time, place and persons present.

Now, ordinarily in the trial of a case, if you have not laid a foundation, a witness may not be impeached under any circumstances, and that ends it. In this case we have gone a little further. Assuming that you neglected to lay the foundation, so that all of the evidence may be before the court, the witnesses being present in the courtroom, I have stated that you may lay the foundation. Now, if you are interested in what Mr. Carraro said, in other words, if you believe that Mr. Carraro made a statement that is contradictory of his present testimony here today, then you may put him on the stand and ask him directly whether or not he made such-and-such a statement. If he admits he made the statement, the matter is at an end, that is all there is to it. If there is an impeaching admission, he is then impeached. If he does not admit it, then you may offer proof that he made the statement. Now, that is the only way that you can impeach a witness.

Now, if it is not for a matter of impeachment and if it is a matter of admission, then, in order

(Testimony of Fred L. Macartney.)

to bind the [74] Corporation, you will have to make some showing as to the particular matter on which you are seeking an admission and show that the individual was an agent of the Corporation and authorized to act and speak as he did. And if I may take the extreme, as an illustration, obviously the receptionist in the lobby of the Times Building would not have authority to make statements as to questions relative to the microfilming.

Mr. Wyshak: Your Honor, my feeling was this: That in view of the fact that it was being offered for an additional purpose, it wouldn't be necessary to establish a foundation with Mr. Carraro, in view of the fact that I contend it was also an admission.

The Court: You do not seem to understand the purpose of impeachment. May I repeat just once more, that a witness may never be impeached without first being confronted with the statement and given an opportunity to explain. I don't even know what you have in mind, but as an illustration, Mr. Carraro testified that the microfilm was used only by Mr. Krauss and Cleve Jones, and it may be that he told this witness that the microfilm was used by Cleve Jones, Mr. Krauss and Kyle Palmer, but you can't impeach him without first putting him on the stand and asking him whether or not at such and such a time, with such and such people present, he said that Kyle Palmer used the microfilm. Now, [75] of course the purpose of that is that he may then say, "I did say that", and he would be entitled to explain the discrepancy. He may say, "I

(Testimony of Fred L. Macartney.)

did say that and my reason for not testifying to that today is because I just didn't think of it", or whatever his excuse may be. That is for the court, that goes to the question of the weight of impeachment, but you can't impeach him without first asking him the question.

Mr. Wyshak: Well, I should like to recall Mr. Carraro, your Honor.

The Court: All right. You may step down.

ROMEO CARRARO

having previously been duly sworn and testified on behalf of plaintiff, resumed the witness stand and testified further as follows:

Examination

Q. (By Mr. Wyshak): Mr. Carraro, directing your attention to July, 1950, do you recall an occasion when Mr. Bowers brought Mr. Macartney and another agent down to the Morgue, when you were there? A. I do.

Q. Did Mr. Bowers request you on that date to show Mr. Macartney around and answer any questions he might have?

A. He didn't request me to show Mr. Macartney anything. [76]

Q. What did he request you to do?

A. He asked me to show the two gentlemen that were with him—and Mr. Macartney was in the background—to show them the morgue and the vault where our bound volumes were.

(Testimony of Romeo Carraro.)

Q. Who were those two gentlemen?

A. I do not know. I was introduced to them and I don't think I have ever met them since, and I took them in the vault, showed them our bound volume, showed them where our microfilm was stored and the machine, where the machine is stored.

Then Mr. Macartney and I was in the background and he was asking me questions about the operations and I recall the conversation with Mr. Macartney, and that is all.

Q. Did Mr. Macartney go with these two gentlemen into the vault with you?

A. Yes, he came in. We all went into the vault.

Q. Were these two gentlemen Revenue Agents?

A. Well, I assumed they were.

Q. You do not know if they were?

A. I assumed they were, from Mr. Bowers' instructions and that he was bringing them down.

Q. Was anyone with Mr. Bowers when they came down?

Mr. Mackay: Off the record. [77] Did you, Mr. Macartney, have somebody else from your office there at that time?

Mr. Fred L. Macartney: Yes, Mr. Bohler.

Mr. Mackay: Let the record show that Mr. Bohler was present. And wasn't Mr. Bennion and I there with Mr. Bowers?

Mr. Macartney: Yes, sir.

My Wyshak: No one else was there?

Mr. Mackay: No one else, Mr. Macartney?

(Testimony of Romeo Carraro.)

Mr. Macartney: I don't believe so.

Mr. Mackay: Let it be stipulated that those people were present.

The Witness: And——

The Court: Just a minute. There is no question.

Q. (By Mr. Wyshak): Do you recall what Mr. Bowers said to you when he introduced you?

The Court: Just a minute. If this is for the purpose of laying a foundation for impeachment, just ask him Did he say so-and-so, word for word, make it verbatim if you can, because that is the question you will ask him for the impeaching question. You don't have to ask him what he said. Just say "On that occasion" did he say such and such.

Q. (By Mr. Wyshak): On that occasion, in your conversation with Mr. Macartney, did you say that the microfilm was used for the period prior to October, 1910? [78]

A. No, I don't think so, because we have a file for four months of 1894——

Mr. Wyshak: Just answer the question.

Mr. Mackay: Let him explain.

A. I am going to answer your question. ——and all of 1895 to 1910, which is in good order, which we used, and we still use it today in preparation of this column and we do not use microfilm for that purpose; and as I stated and told Mr. Macartney, where microfilm is to be used, where the public wants it, we send them to the Public Library.

Q. (By Mr. Wyshak): When Mr. Bowers in-

(Testimony of Romeo Carraro.)

troduced you to Mr. Macartney, what was the substance of what he said to you.

Mr. Mackay: I object to that.

The Court: The objection is sustained.

Mr. Wyshak: Your Honor, I would like to introduce that to show authority delegated by Mr. Bowers as an officer of the Corporation, to Mr. Carraro to speak on behalf of the Corporation.

The Court: Well, I don't know whether Mr. Bowers had authority to delegate to him on behalf of the Corporation. Is that the statement, counsel? Is that the statement that you are seeking to introduce as an admission against interests? [79]

Mr. Wyshak: The fact that he said that they used the microfilm of editions prior to 1910 is the statement. Now, I would like to show that Mr. Carraco was authorized by Mr. Bowers to speak on behalf of the Corporation.

The Court: Counsel, don't you see that he has testified that he did not say that?

Mr. Mackay: That is right.

The Court: He has testified that he did not say that.

Mr. Wyshak: That is correct, your Honor.

The Court: Now, of course you have laid your foundation for impeachment. You now may put on testimony to show that he did say that, and the question then is for the Court to determine whether or not it is contradictory and the effect of the impeachment.

Mr. Wyshak: Well, your Honor, I may be mis-

(Testimony of Romeo Carraro.)

taken, but in addition to impeachment I should like to introduce the statement as heard by Mr. Macartney for the purpose——

The Court: Counsel, you can't introduce the statement from this witness because this witness has testified that he did not say it. Now he has testified that he didn't say it.

Mr. Mackay: Yes, sir.

Mr. Wyshak: Well, that is all, Mr. Carraro.

Mr. Mackay: You may step down. [80]

FRED L. MACARTNEY

resumed the witness stand on behalf of the defendant, having been previously duly sworn, was examined and testified further as follows, to-wit:

Direct Examination—(Continued)

Q. (By Mr. Wyshak): Directing your attention, Mr. McCartney, to this day when you visited the Times Building, I believe you stated that you conferred with Mr. Bowers, Mr. Mackay, his associate, and Mr. Carraro? A. Yes, sir.

Q. When Mr. Carraro was showing you around the vault, did you have any conversation with him with respect to the use to which this microfilm was put? A. Yes; we did.

Q. And what did he state in answer to you?

Mr. Mackay: Just a minute.

The Court: This is a case even on direct examination, as I stated before, where you can ask a leading question. If it is for the purpose of im-

(Testimony of Fred L. Macartney.)

peachment, now you can ask him the same question you asked the witness in laying the foundation. The custom is to write it down and have it in front of you so you can give the same question exactly. That is the proper way to impeach.

Q. (By Mr. Wyshak): Did Mr. Carraro say to you that they used [81] the microfilm for all periods prior to 1910?

The Court: Yes or no.

A. Yes.

Mr. Wyshak: That is all.

Cross Examination

Q. (By Mr. Mackay): Mr. Macartney, you have been in the Revenue Service for quite a while, haven't you? A. Yes, sir.

Q. On that occasion when you came to the Times-Mirror in 1950, you were invited there by myself and Mr. Bowers, weren't you?

A. Yes, sir.

Q. And we took you down to the Morgue, did we not? A. Yes, sir.

Q. And didn't Mr. Carraro say at that time that the microfilm is used very seldom and that it was only used when they didn't have some bound volumes for certain particular years?

A. No; I think not.

Q. He did not say that?

A. There was a statement made prior to that which I was investigating. This is my answer to that statement.

(Testimony of Fred L. Macartney.)

Q. What do you have before you now?

A. You filed the claim and you made statements in the [82] claim.

Q. What do you have before you now?

A. My report.

Q. Your report? A. My script report.

Q. May I see it? A. Yes.

Q. When was this script report made?

A. August of 1950.

Q. When you were down at the Times-Mirror Building, when did this conversation take place?

A. When we were down in the Morgue, at the Times-Mirror.

Q. I know, but when, approximately?

A. About right around the 1st of August or last of July, 1950.

Q. You made no notes at that time of the conversation, did you? A. Yes, I did.

Q. You mean when you were in the vault?

A. No; not——

Q. You didn't make any notes of the conversation at that time, did you?

A. Not at that minute. That day, probably. This is made from my notes.

Q. I know, but you didn't make any notes at the time? [83] A. Not in the vault.

Q. You made the notes several days after?

A. I think I made them immediately that day.

Q. You mean after you returned to your office?

A. Yes.

Q. Were you shown the microfilm?

(Testimony of Fred L. Macartney.)

A. Yes, sir.

Q. Did you look through the projector?

A. Yes.

Q. Isn't it a fact that Mr. Carraro explained the great difficulty that people would have in using the projector and the microfilm? A. No, sir.

Q. He didn't explain it?

A. I don't remember that point. It was obvious that it was easier to look at a newspaper by size than by the size of the opening in the projector.

Q. That was a very obvious thing? That was very obvious? A. The size was obvious.

Q. Didn't he explain to you that there were some copies missing? A. Throughout.

Q. Yes. A. Yes, sir. [84]

Q. And that they didn't have them in the bound volume? A. Yes, sir.

Q. And didn't he explain that they had procured some copies from Universities and libraries which were in the microfilm? A. Yes, sir.

Q. And didn't he tell you at that time that the microfilm was used in those situations where they wanted copies of a paper which were not in a bound volume? A. Very likely.

Q. Well, he did tell you that, didn't he? There isn't any doubt about that, is there?

A. Well, that would be included in the other statement he made. Those periods were prior to 1910. The other statement that I said was made, that the film was used for periods prior to 1910,

(Testimony of Fred L. Macartney.)

would include those that were missing in paper volumes.

Q. Didn't he state that they were used when they were missing prior to 1910?

A. When a paper from the volume was missing prior to 1910, any part they had film of.

Q. And he showed you the bound volumes he had prior to 1910, didn't he? A. Yes.

Q. And you knew that they were being used at that time, [85] didn't you, to the extent that they could be used?

A. They had been used for filming. I saw the condition of them. I saw why he wouldn't——

Q. I know, but the copies of the bound volumes prior to 1910 that they had, you knew they were in use at that particular time, didn't you?

A. No. I was led to believe they were not.

Q. By whom?

A. By Mr. Carraro; and that the film, the micro-film was used.

Q. Have you anything in your statement there where they said that the bound volumes prior to that time were not used? A. Yes.

Q. Let me see it.

The Witness: Here is——

Mr. Mackay: Just a minute.

Q. Was there any distinction that Mr. Carraro made there between the use by the public and by the employees of the Times-Mirror?

A. Yes.

Q. And didn't he tell you that bound volumes

(Testimony of Fred L. Macartney.)

even prior to 1910 were used by the employees of the Company and that the public would use the microfilm for the editions prior to 1910 where there were none in the bound volumes? [86]

A. He told me that prior to 1910 they used the film.

Q. For the public?

A. That they had two volumes subsequent to 1910.

Q. For the public?

A. Well, he didn't break them down as to which was using them.

Q. Oh, he didn't break them down as to which. Did you measure the vault?

A. I didn't understand you?

Q. Did you measure the vault where these papers, documents were contained?

A. Only roughly.

Q. By steps? A. No.

Q. How did you measure it?

A. Just like I would this room.

Q. What do you guess the size of the vault was?

A. Half the size of this room.

Q. Do you remember how many feet?

A. No. I would say 60 by 35.

Q. Well, didn't you put in your report how much its size was?

A. Very likely. 30 by 60 (Indicating paper.)

Q. 30 by 60.

Mr. Macartney, is it not a fact that Mr. Carraro showed [87] you bound volumes prior to 1910 that

(Testimony of Fred L. Macartney.)

were bound in leather and were in excellent shape and condition?

A. I don't think they were in excellent shape and condition.

Q. Well, didn't he show them to you?

A. I had the impression—I saw all the volumes in the vault, but I didn't inspect each one of them, because there were quite a few. I inspected a number that were damaged and burned and charred on the end, and I presumed all of them had been in the fire and all of them had suffered by heat.

Q. Then, because a few of them were damaged by the fire in 1910, you assumed all of them prior to that time were damaged and weren't available, isn't that true?

A. That they were all damaged.

Q. I beg your pardon?

A. That they were all damaged.

Q. That is what you assumed, isn't it?

A. Yes.

Mr. Mackay: If your Honor please, I should like to have this court, if he could, go over there and see the bound volumes. I will withdraw that. I am perfectly willing to do that, because we know we have the bound volumes there and in good condition prior to 1910.

I think that is all from this witness. I may say for [88] the record, Mr. Macartney is a very fine agent, but I think he is just mistaken and he makes assumptions which aren't justified.

(Testimony of Fred L. Macartney.)

Redirect Examination

Q. (By Mr. Wyshak): Mr. Macartney, in answer to Mr. Mackay's last question did you state that you assumed or presumed that all of the volumes prior to 1910 were damaged?

A. Yes, sir.

Q. Did you look them over?

A. I looked over quite a few of them.

Q. Well, what percentage of them would you say you looked over?

A. Well, on some the volume shows from quite a distance, you can see that it has been damaged from water and fire and heat, and I looked at some of them closely. Some I didn't look at because they were piled up high on the racks, but they were all in a place where the fire and heat and water and bombing had taken place, and the idea of the film was because those were deteriorating so fast after the destruction.

Q. Well, did you see any of those volumes prior to 1910 that were in good condition?

A. Well, they may have been in good condition. They appeared to—— [89]

Q. Did you see any?

A. I saw all of the volumes. I don't know what the condition of all the volumes was.

Q. Did you see any volumes prior to 1910 that were in good condition?

A. Well, they appeared to be in good condition, but I couldn't—only by appearance.

Mr. Wyshak: That is all.

(Testimony of Fred L. Macartney.)

Recross Examination

Q. (By Mr. Mackay): Well, if they appeared to be in good condition, why would you assume they were not available for use?

A. I was there inspecting them for that very purpose, to see what they were for.

Q. Do you know how many volumes were there prior to 1910 bound in good red leather and in good condition?

A. No. I could guess.

Mr. Mackay: No; I don't want your guess. That is all.

The Witness: What did you say?

Mr. Mackay: That is all. I would like to recall Mr. Carraco. I beg your pardon. Are you finished?

The Court: Just a moment. Have you rested?

Mr. Wyshak: Yes, your Honor, the defendant rests.

The Court: All right.

(The defendant rested its case.) [90]

(Thereupon the plaintiff, to further maintain the issues on its behalf, offered and introduced the following evidence, in rebuttal, to-wit:)

ROMEO CARRARO

recalled as a witness herein on behalf of the plaintiff, in rebuttal, having been previously duly sworn, testified further as follows, to-wit:

Direct Examination

Q. (By Mr. Mackay): Mr. Carraro, in what condition in 1950, prior to Mr. Macartney visiting

(Testimony of Romeo Carraro.)

the Times plant, were the bound volumes prior to 1910, would you say?

A. I would say that 90 per cent of the bound volumes prior to the period that Mr. Macartney states are in good condition.

Q. How are they bound?

A. They are bound in red leather.

Q. Are they readable?

A. They are very readable.

Q. And are they being used today?

A. They are being used today.

Q. And have they been used ever since 1943——

A. They sure have been.

Q. ——since this filming was done?

A. They sure have been. [91]

Q. Now, did you ever tell Mr. Macartney that the positive film was used for all examinations prior to 1910?

A. No, I didn't tell him that statement.

Mr. Mackay: I think that is all, your Honor.

Mr. Wyshak: No questions.

The Court: You may step down.

(Witness excused.)

Mr. Mackay: Your Honor, at this time we rest.

(The plaintiff rested its case.)

The Court: Do both sides rest?

Mr. Wyshak: Yes, your Honor.

(The Defendant rested its case.)

Mr. Mackay: I would like to make a motion for judgment on the record, if your Honor please. Would you care for an argument at this time?

The Court: You may argue it.

Both sides have rested. If you care to argue it, you may do so.

Mr. Mackay: I would like to, if your Honor please. [92]

Opening Argument by Mr. Mackay on Behalf of
Plaintiff Times-Mirror Company:

Mr. Mackay: If your Honor please:

The law seems to be pretty well settled, I may state, that the question of whether an expenditure is an ordinary and necessary business expense or is a capital expense which should be capitalized depends upon the nature of the business and the purposes for which that money was expended.

The Tax Court and a number of courts have consistently held that where an expenditure is made for the protection of property, not to increase, not to enlarge and not to prolong the life of the plant, that is an ordinary and necessary business expense because it does not add to the capital value of the assets.

Now, the courts have held with respect to newspaper companies that if they buy a large circulation structure, that they would have to capitalize that expenditure, because that is about to increase their circulation, but if they go out and get circulation to keep up their normal operations to the same level, that that is an ordinary and necessary expense.

We have cited the Bemberg case in our brief where a company's plant had some disastrous cave-

in which threatened to annihilate it and they expended over [93] seven hundred thousand dollars in one year and approximately two hundred thousand dollars in another year, for the purpose of protecting it, and the appellate court of the United States said that that was an ordinary and necessary expense.

We have also cited the Illinois Merchants Trust Co. case, involving the situation of another plant, where low water exposed parts of its piles and dry rot set in, and they sawed off the piles and put cement sections under the plant, at great expense, and the court held that that was an ordinary and necessary expense.

Now, the evidence in this case, if your Honor please, is just this:

On February 25, 1942, we had here what we thought was a very serious thing; there was a bombing, so the papers say. I appreciate that the Army and Navy didn't, and reports were conflicting, but as far as the general public knew, it was real and they were scared. So under the law of self-preservation, this taxpayer decided to protect itself, and decided that it should have its back papers microfilmed, and it did. It kept the negative in its own files in a different place than where it kept its own print and positive. It gave a positive print to the Public Library so that that would be available in the event that the Times-Mirror should be bombed. [94] It gave the Huntington Library a copy in the event that both the Times-Mirror and the Public Library were bombed, so that the plain-

tiff could go ahead and print its paper. It was not done to increase the circulation at all. It was not done to increase the earning capacity of The Times-Mirror. It did not add to the capital value of the Company at all.

The microfilming was done solely for protection. It is an ordinary and necessary business expense and small in comparison with the expenses of this Company of over eight million dollars in each of the calendar years of 1943 and 1944.

It has been, if your Honor please, an ordinary and necessary thing for companies to preserve their records. Lawyers do it and now we have to do so by making so many copies. All of that is ordinary and necessary. Copies have to be made for the State and Federal Governments. We have to do it because the Government says that we must do it. I know that all lawyers do it, because the Government says so, and we have to hire a lot more of accountants, clerks and secretaries who build up records and records and records.

Then, of course, we have various records photostated and it is an ordinary and necessary expense. We do that today in connection with ordinary and necessary things. [95]

When documents are photostated, all commercial businesses treat such expenditures as an ordinary and necessary function and expense.

There is no difference between the preservation of records of current years and the preservation of records of prior years. What difference does it make if we do all the microfilming at the end of each

year or we do it for 12 years? The Commissioner of Internal Revenue should allow the deduction.

Whether we do it by microfilming, photostating or in a number of other ways, for a current year, he allows it, and it doesn't make any difference whether we do it all in one month or do it in 12 months. And why should it make any difference if we do it for a number of years? It is all for the same purpose, and the Supreme Court has said that it isn't the amount that determines the character of the expenditure, as said in these cases where there were huge attorneys' fees paid only once in a lifetime. And the Supreme Court said that did not make any difference, that didn't make it less of an ordinary and necessary expense, because of the amount.

If your Honor please, with a threatened attack like there was, a company wants to protect its property, it wants to have something with which it can go ahead with business if it is bombed, and these people selected 3 different places for their film. It was an ordinary and necessary [96] thing to do. It would be a cruel thing to deny that deduction when the newspaper company expends that money in that way.

The evidence is uncontradicted as to why it was expended. It was done for no other purpose than that. If your Honor please, the evidence is uncontradicted that the plaintiff had its old newspapers microfilmed and copies of such microfilm placed in various places to enable it to continue its plant in operation.

It is true that when the plaintiff had the filming commenced, it wanted to get as many back copies as they could and they sought them from the State Library and they sought them from other sources, and they got some thirty thousand pages, I think one witness testified, that they didn't have, that they put in the microfilm.

However, the microfilm in so far as this Company is concerned, and I am speaking of the positive print, was used, as the testimony shows here, by only two individuals and only for a very short time. It is incomplete, because when they microfilm it in this way, it doesn't separate and they couldn't get the full thing, and it was used only to go back for a certain number of years. Since 1950 it has not been used by them. It isn't used by the public.

Mr. Bowers testified relative to when the public comes [97] in and they want to know something about it and they do not have a record in their bound volumes where it would be the easiest to obtain, then nobody could go to the microfilm. The employees know that too; they know it is difficult to get there, but they wouldn't go there; they would first go to the bound volumes. But if the public wants to get something and if they don't have that in the bound record there, they send them over to the Library or they can write in there if they want it.

Mr. Carraro said that he personally has used the positive film no more than half a dozen times a year to answer letters or inquiries which come to

him, in which case they go to the microfilm viewer, turn it on and they are answered.

If your Honor please, less than 3 per cent of the film that is down there constituted papers they got from other places, I think about 30,000 of 825,000 pages, or something like that. That doesn't make any difference in so far as increasing their earning capacity. There is no contradictory testimony here as to the reason why this was done. It has not increased the circulation and couldn't increase the circulation if they had 50 volumes. That is an obvious fact. If they have 50 volumes, how in the world could that increase their earning capacity? [98] How could that be an asset or add to the capital value of the business?

After all, taxation should be practical.

Bankers would not pay any attention to it just because of making an extra number of copies of documents in their business in one year and they would treat it as an ordinary expense.

It seems to me, if your Honor please, that it is obvious that this is just an ordinary and necessary expense, and we move for judgment on the record.

The Court: We will recess for five minutes.

(Recess.)

The Court: You may proceed, Mr. Wyshak.

Argument by Mr. Wyshak on Behalf of Defendant:

Mr. Wyshak: May it please the Court:

We submit that this question is primarily one of law since the facts are substantially uncontroverted.

The burden of proving that this expenditure resulted in a deductible expense is on the plaintiff.

The Regulation allowing for the deduction of such an expense as opposed to a capital expenditure and that Regulation which is the most pertinent is the one dealing with Repairs, one having to do with additions to the capital account, which is Section 39.23 (a)-4, and it reads as follows: [99]

“The cost of incidental repairs which neither materially add to the value of the property nor appreciably prolong its life, but keep it in an ordinarily efficient operating condition, may be deducted as expense, provided the cost of acquisition or production or the gain or loss basis of the taxpayer’s plant, equipment, or other property, as the case may be, is not increased by the amount of such expenditures. Repairs in the nature of replacements, to the extent that they arrest deterioration and appreciably prolong the life of the property, should be charged against the depreciation reserve if such account is kept.”

Now, the question is whether in this case this expenditure, which clearly resulted in an asset for the useful life of more than one year, is deductible as an expense or not.

The plaintiff has submitted no evidence regarding the useful life of this property, on the assumption that the court may rule that it was a capital expenditure. We therefore submit that the Commissioner’s determination that it had a useful life of 25 years should be sustained, in the event that the

court does rule that the expenditure was a capital expenditure.

These questions cannot be decided easily. There is a [100] case which is cited in the plaintiff's memorandum which was cited in that Bemberg case cited by the plaintiff, which was one of these Board of Tax Appeals cases, the Illinois Merchants Trust Co. case, 4 B.T.A. 103, which has more or less set forth a rule to be used, to be weighed in such determinations. That case, at page 106 in 4 B.T.A., states:

"To repair is to restore to a sound state or to mend, while a replacement connotes a substitution. A repair is an expenditure for the purpose of keeping the property in an ordinarily efficient operating condition. It does not add to the value of the property, nor does it appreciably prolong its life. It merely keeps the property in an operating condition over its probable useful life for the uses for which it was acquired. Expenditures for that purpose are distinguishable from those for replacements, alterations, improvements or additions which prolong the life of the property, increase its value, or make it adaptable to a different use. The one is a maintenance charge, while the others are additions to capital investment which should not be applied against current earnings."

In this case the expenditure for the microfilm was in order to acquire an asset which could replace the library [101] when there is call for back editions of the newspaper. There has been testimony that it has been used to some extent.

I submit that on the whole it is immaterial as to what use that was put to in the subsequent years.

It shouldn't make any difference whether this was a newspaper, publisher or a bank, or any other industrial corporation that decided to microfilm its records in the event of destruction for one reason or other.

We further submit that the amount is material, and I believe that counsel for plaintiff agreed with me in his argument that the amount of the expenditure is immaterial. He points out that it was only \$76,000.00 as compared to expenditures of over \$8,000,000 in one year's operations of the Times-Mirror.

I don't think that there is any question but that the trucks the Times purchases, which I am sure don't cost over 3 or 4 thousand dollars apiece, have to be depreciated.

Here we have an expenditure of almost 20 times that amount, which he says is a drop in the bucket as compared to what they expend during the year.

I submit that the amount is material.

A comparable situation arose in a First Circuit case, the Russell Box Company case, a 1953 case.

The Court: Is it cited in your memorandum?

Mr. Wyshak: I don't think it is, your Honor. I have the Commerce Clearing House report. It is cited in 54-1 USTC, paragraph 9126. It is a December, 1953 decision of the First Circuit, involving a fence which was constructed around a plant. The first question in that case was whether the cost of erecting this fence was a capital expenditure or an

expense, and I should like to read from that opinion the court's remarks:—

“The fence in question was a substantial steel structure designed to keep out intruders, and although on two sides of the property it supplanted an old out of repair wooden fence, it cannot possibly be regarded as *pro tanto* a repair of the old fence. It was clearly a new structure, and the taxpayer does not establish its claim for deduction in one year either by showing that it planned to tear the fence down as soon as the war emergency was over, and did so, or that the fence impeded access to the building and so in the long run did not enhance the value of the property. Perhaps the fence was a nuisance, but it was nevertheless erected to serve the definite purpose of protecting the property, and it served its purpose thereby increasing the value of the property for war work for a matter of years. The fence may have [103] had only a short useful life, but that does not prove that it was not a capital improvement while it lasted.”

I think the analogy is quite close, your Honor. Then, assuming for the sake of argument only that this microfilm was useful only while World War II was in effect, it still did serve the purpose during the years while the war was in effect.

I believe that Mr. Bowers testified that he was concerned and felt that the purpose of the micro-filming was in the event of a bombing. No evidence was submitted, no directors' resolutions were introduced as to the intent or the purpose as considered

by the person who ultimately made the decision that those records should be microfilmed.

In the years subsequent to the years in question, the negatives of the microfilm were used in order to make copies of the Times library for various colleges and libraries. We submit that this was in the nature of a good will expenditure which is clearly not deductible, and that it further evidences the fact that the microfilming did serve an additional purpose, in addition to protecting the Times library.

We feel that an analogy can be made that the microfilm which was distributed to the Huntington Library and to the Los Angeles Library did in effect prolong the life of the [104] records of the Times, in view of Mr. Bowers' testimony that they referred the public to the Los Angeles Library when a person came to examine a prior edition of the Times.

I believe that the Bemberg case which has been cited in the plaintiff's memorandum is distinguishable on the basis of the findings of fact there made by the Tax Court. In that case the Tax Court said that:

“The purpose was not to improve, better, extend, or increase the original plant, nor to prolong its original useful life. Its continued operation was endangered; the purpose of the expenditures was to enable petitioner to continue the plant in operation not on any new or better scale, but on the same scale and, so far as possible, as efficiently as it had operated before. The purpose was not to rebuild

or replace the plant in whole, or in part, but to keep the same plant as it was and where it was.”

In this case, the microfilming was clearly a replacement of the library of the Times in the event that something should happen to its original paper-bound editions, and we submit, your Honor, that this expenditure resulted in a capital expenditure which can only be recovered in tax benefits derived from depreciating it over a 25-year period. [105]

The Court: Counsel, how do you justify the Commissioner's distinction between the microfilming of those records of past years and the microfilming periodically of current papers?

Mr. Wyshak: Well, your Honor, my opinion is purely a personal opinion. Who wrote that T.C. ruling I don't know, and it is fairly short without citation of authority. It would seem to me that the rule there adopted with respect to current records is a rule of practicality.

First of all, assuming the current microfilming would be capitalized and tax benefit derived from a depreciation deduction, this would be a situation which would run into complications as a matter of figuring, and in view of the fact that each year there would be current microfilming, the net result is substantially the same; instead of saying that each year's microfilming had to be deducted over a 25-year period, after a while the total depreciation deductions would equal the deductions for the current years microfilming.

But I feel that it is probably a rule which allows for administrative feasibility, such as I am sure

the agents allow on small items which have a useful life of more than one year, allowing them to be expended because of the complications and work entailed and the small amounts which would be involved in depreciating them. [106]

The Court: Of course, this is no small item.

Mr. Wyshak: That is correct, your Honor.

The Court: And in a few years, it will cost more than the cost of microfilming those records prior to 1942. In other words, over that period of time it is likely to be a bigger item than the one involving the records prior to 1942.

Mr. Wyshak: That is right.

The Court: I do not get the basis for the distinction, but I take it that it would be your position and the Commissioner's position that instead of the practice of microfilming each month, if they microfilmed once a year, that would be allowed as a deduction.

Mr. Wyshak: I should think so, your Honor.

The Court: How about it if they microfilmed once every two years?

Mr. Wyshak: Well, I believe that the rule is such because of the current recurring nature of it. A Tax Court case I recently ran across might be considered as some analogy. An individual had apparently replaced one of his secretaries by a recording device and sought to deduct the cost of the device as an expense, by saying "Well, the salary I paid the stenographer would be deductible, and the cost of the recording device to replace the stenographer would naturally be deductible [107] as an ex-

pense." And the court there held that he had to recover the tax benefit for the cost of that machine through depreciation deduction.

So it doesn't necessarily follow that because you allow a current deduction of one nature, a replacement of some sort would have to be accorded the same tax treatment.

The Court: Of course, the thing that bothers me is that if it is an ordinary and necessary business expense in the conduct of their business to have microfilm of the current papers, if it is correct to say that that is an ordinary and necessary expense of doing business, then why isn't it an ordinary and necessary expense of doing business for them to have them microfilmed for the last year and the year before?

Mr. Mackay: Certainly.

Mr. Wyshak: Well, I think that "ordinary and necessary" language doesn't necessarily mean that it can be deducted in one year. I think similarly that the "ordinary and necessary" language can be carried over to a capital expenditure.

The Court: Well, if it was an ordinary and necessary expense of the business, then it is not a capital expenditure, is it?

Mr. Wyshak: Well, if it is an expense, that is correct, [108] your Honor, but I am saying that you can apply that "ordinary and necessary" language to the capital expenditure, if it is deductible at all.

The Court: The Commissioner says that this is an ordinary and necessary expense in the conduct

of the business of the Times-Mirror, that is, the microfilming of this month's and last month's newspapers is an ordinary and necessary expense of their doing business.

Now, my question is this: I want to know, if that is true, why isn't the microfilming of last year's newspapers an ordinary and necessary expense of their doing business? If they need the microfilm for this year, why wouldn't they need them for last year?

Mr. Wyshak: Well, I will have to confess, your Honor, that I agree with you to this extent: As you said, it is true. I personally disagreed with the Commissioner's ruling that the expense of making the microfilm of current issues is deductible as an expense. I think it can be analogized with the trucks again. They have to buy trucks every year. The trucks are wearing out all the time. They can't deduct the cost of those trucks as an expense, although they are clearly ordinary and necessary in the operation of their business. These trucks have a useful life of more than one year.

I feel that the microfilm has a life of more than one [109] year and I think that its cost should be capitalized for current years and that the prior years' costs of the microfilming should be capitalized.

I think the main reasoning in the ruling which states that the cost of the current year's microfilming can be deducted as a business expense is a rule of reason and nothing else, but I go along with your Honor, to be consistent, that if the prior years'

microfilming should be capitalized so should the current year's microfilming be capitalized, because this microfilm has a life of more than one year.

The Court: I assume that this is not an isolated case. I would assume that during the War there were many newspapers throughout the country that probably microfilmed their libraries, and I also assume that because you haven't cited any cases like this to me, this is probably the first one that has reached the courts.

Mr. Wyshak: That is correct, your Honor. Off the record, the Agents did canvass several newspapers in the area and couldn't come to any definitive answer on it.

The Court: What do you mean by that?

Mr. Wyshak: What I mean is, in order to determine the tax treatment accorded to other newspapers, and I recall seeing in the administrative file a memorandum to one of the Agents to see if he could determine from [110] several of the newspapers, and I believe at that time none of them had done any microfilming.

The Court: Oh, that they had not done any?

Mr. Wyshak: That they had not, that is correct, your Honor. But in this case I don't see how there is any question but that the expenditure is for a useful asset with a useful life of more than one year.

The Court: Well, the Commissioner made this ruling in 1945.

Mr. Mackay: That is right.

The Court: He didn't make it just at the time he did because of this microfilming in this case?

Mr. Wyshak: Not that I know of, your Honor.

The Court: I assume that he made the ruling to cover newspapers in general. I assume that a practice had been adopted during the War to microfilm libraries and I assume that you must have had other actions before which were similar to this. Is that right?

Mr. Wyshak: I don't know of any, your Honor.

The Court: At any rate, they are of no help to us there, because I am sure that if any of them had ever reached the courts, they would have been submitted to me.

I also assume that neither counsel could be of any further help to the court in so far as submitting any additional authorities are concerned.

Mr. Mackay: I think that is right, your Honor.

The Court: You have both submitted authorities and there are not any more of them?

Mr. Mackay: There are no more.

Mr. Wyshak: I think you are right. The only additional one I have is the Russell Box Company case which I think is quite appropriate.

The Court: What was that citation again?

Mr. Wyshak: Russell Box Company, et al. vs. Commissioner, a First Circuit case. The decision is dated December 23, 1953. It is cited in 54-1 C.C.H., paragraph 9126.

The Court: Cited where?

Mr. Wyshak: In Commerce Clearing House Federal Tax Reporter. I am sure I can locate a Federal

(2nd) citation for you, your Honor. It is cited in 54-1 USTC, paragraph 9126.

The Court: 54-1, paragraph what?

Mr. Wyshak: Paragraph 9126.

The Court: All right, if you find a Federal (2nd) citation of it, will you submit it to me?

Mr. Wyshak: I shall do that, your Honor.

Mr. Mackay: I should like to make this observation about that last case counsel cited. It seems to me that there is a tremendous difference between the tax in that case and in this one. There it was decided that it was [112] capital improvement to land or property, but here we have the situation of where all this taxpayer is doing is trying to preserve its records, and that has been going on ever since the plaintiff started to do business.

And I agree with your Honor 100 per cent. I think it is right that the Commissioner himself has ruled that current filming is an ordinary and necessary expense whether it is all done monthly or whether it is done at the end of a year or what not, for purposes exactly the same, which is to perpetuate its records for future use, but, notwithstanding the fact that he says that are deductible as ordinary and necessary expenses for current years, there can be no difference between microfilming 12 months back in one year or for 2 or 3 or 4 years, or to wherever it goes back, the purpose is exactly the same, and it is ordinary and necessary expense.

We submit it, your Honor, and ask for judgment.

Just a moment, please, If your Honor please, I would like to make this observation:

The Court: All right.

Mr. Mackay: We have made inquiries all over the country. So far as I know, this is a unique case. We know there is none in the courts. We think this is a unique case, and I really believe from the investigation that we have made, and I can't say it with any more effect [113] than what counsel says he saw in the report he mentioned, that perhaps we are the only case in which the Commissioner ever tried to disallow the deduction, and that is the information we got from the people that we have talked with about it, and I think it is unique.

The Court: Well, of course it may be unique in that you have heard of or know of no other case, but that may be because there has not been any microfilming by any other newspaper companies, in other words, the plaintiff is the only one that has microfilmed its newspapers. It doesn't seem to me that that would have been likely, that it would have been the only newspaper concern to do any microfilming of their library. Of course, as you say, it may be because the Commissioner hasn't disallowed it in the case of other newspapers. It would be just as likely that no one else tried to claim the deduction for expense after it was disallowed.

Mr. Wyshak: The Agent advises me that that is true, your Honor.

The Court: Well, of course I can't pay much attention to either side in that respect, unless you give me something more concrete.

It will be taken under submission.

Counsel, when this case is decided, the clerk will advise you that the judgment will be for the plaintiff or [114] for the defendant. Then of course I will expect counsel to proceed under 7 (h), on computations; in other words, you will either agree or submit computations.

Mr. Mackay: We will, your Honor.

The Court: All right.

[Endorsed]: Filed October 25, 1954.

[Endorsed]: No. 14582. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. The Times-Mirror Company, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: November 20, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14582

UNITED STATES OF AMERICA,
Appellant,

vs.

THE TIMES-MIRROR COMPANY,
Appellee.

APPELLANT'S STATEMENT OF POINTS

Pursuant to the provisions of Rule 17 (6) of the Rules of the United States Court of Appeals for the Ninth Circuit, appellant hereby adopts its Statement of Points on Appeal, which was filed in the District Court, as its statement of the points upon which it intends to rely in this Court.

Dated: This 19th day of November, 1954.

LAUGHLIN E. WATERS,
United States Attorney

EDWARD R. McHALE,
Assistant U. S. Attorney
Chief, Tax Division

ROBERT H. WYSHAK,
Assistant U. S. Attorney

/s/ ROBERT H. WYSHAK,
Attorneys for Appellant

[Endorsed]: Filed November 22, 1954. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD

Pursuant to Rule 17 (6) of this Court, appellant hereby designates the following parts of the record as being necessary for consideration of the points upon which it intends to rely on this appeal, and desires to have printed, omitting the title of Court and cause from each of the documents designated for printing:

(1) The complete record, certified by the Clerk of the District Court to the Court of Appeals except that only the following portions of the reporter's transcript of proceedings on June 17, 1954, are to be included: commencing on page 9, line 3, beginning, "Q. Mr. Bowers, where do you reside?" through page 92, line 3, ending: "A. No, I didn't tell him that statement."

(2) The District Court Clerk's certification of Record on Appeal;

(3) This Designation of Record Necessary for Consideration on Appeal and to be Printed; and

(4) Statement of Points Upon Which Appellant Intends to Rely on Appeal. (Court of Appeals.)

Dated: This 19th day of November, 1954.

LAUGHLIN E. WATERS,
United States Attorney

EDWARD R. McHALE,
Assistant U. S. Attorney
Chief, Tax Division

ROBERT H. WYSHAK,
Assistant U. S. Attorney
/s/ ROBERT H. WYSHAK,
Attorneys for Appellant

[Endorsed]: Filed November 22, 1954. Paul P.
O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF RECORD

Appellee hereby designates for inclusion in the
printed record: from page 92 (commencing at line
4) to and including page 115 of the reporter's tran-
script of proceedings; and this Designation.

Dated this 2nd day of December, 1954.

MACKAY, McGREGOR, REYNOLDS
& BENNION,

/s/ By A. CALDER MACKAY,

/s/ By ADAM Y. BENNION,
Attorneys for Appellee

[Endorsed]: Filed December 3, 1954. Paul P.
O'Brien, Clerk.



ROBERT H. WYSHAK,
Assistant U. S. Attorney
/s/ ROBERT H. WYSHAK,
Attorneys for Appellant

[Endorsed]: Filed November 22, 1954. Paul P.
O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF RECORD

Appellee hereby designates for inclusion in the
printed record: from page 92 (commencing at line
4) to and including page 115 of the reporter's tran-
script of proceedings; and this Designation.

Dated this 2nd day of December, 1954.

MACKAY, McGREGOR, REYNOLDS
& BENNION,

/s/ By A. CALDER MACKAY,

/s/ By ADAM Y. BENNION,
Attorneys for Appellee

[Endorsed]: Filed December 3, 1954. Paul P.
O'Brien, Clerk.

No. 14582

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

THE TIMES-MIRROR COMPANY, a corporation,

Appellee.

On Appeal From the Judgment of the United States District
Court for the Southern District of California.

BRIEF FOR THE UNITED STATES.

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WILLIAM H. GIBBINS,

CLERK

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No. 14582

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

THE TIMES-MIRROR COMPANY, a corporation,

Appellee.

On Appeal From the Judgment of the United States District
Court for the Southern District of California.

BRIEF FOR THE UNITED STATES.

Opinion Below.

The findings of fact and conclusions of law of the District Court [R. 33-40] are not officially reported.

Jurisdiction.

This appeal involves excess profits taxes for the calendar years 1943 and 1944 in the amount of \$62,357.30 plus interest. The taxes in dispute were paid on October 21, 1949. [R. 35.] Claims for refund were filed on January 26, 1950, and were rejected by notice dated June 27, 1952. Within the time provided in Section 3772 of the Internal Revenue Code of 1939, and on November 20,

1952, the taxpayer brought an action in the District Court for recovery of the taxes paid. [R. 3-22.] Jurisdiction was conferred on the District Court by 28 U. S. C., Section 1340. The judgment was entered on July 29, 1954. [R. 41-42.] Within sixty days and on August 26, 1954, a notice of appeal was filed. [R. 42-43.] Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

Question Presented.

Whether the District Court erred in finding and concluding that under the circumstances of this case the cost to taxpayer of microfilming its file of bound copies of back issues of newspapers was an ordinary and necessary business expense and not a capital expenditure.

Statutes Involved.

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [as amended by Sec. 121(a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses*.—

(1) *Trade or Business Expenses*.—

(A) *In General*.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *

* * * * *

(26 U. S. C., 1952 ed., Sec. 23.)

SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) *General Rule.*—In computing net income no deduction shall in any case be allowed in respect of—

* * * * *

(2) Any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate;

* * * * *

(26 U. S. C. 1952 ed., Sec. 24.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.41-3. *Methods of Accounting.*— * * *

* * * * *

(2) Expenditures made during the year should be property classified as between capital and expense; that is to say, expenditures for items of plant, equipment, etc., which have a useful life extending substantially beyond the year should be charged to a capital account and not to an expense account; and
* * *

Statement.

The facts were found by the District Court substantially as follows:

Since its first publication of the Los Angeles Times in 1881 taxpayer has maintained bound copies of its printed newspapers. For the period subsequent to 1910 taxpayer has two sets of such bound editions, one of which is kept in a vault in its building and is not used. The other is kept in the vault and is used by taxpayer's officers and employees in the day-to-day operation of its business and

also by the public. For the period prior to 1910 various volumes are missing, due to a bombing of taxpayer's plant in 1910, which also damaged certain of the volumes still on hand. [R. 35-36.]

During 1943 and 1944 taxpayer had these newspapers microfilmed. Of the total of 850,579 pages microfilmed at that time, 30,579 represented issues that were missing in its library and were borrowed for microfilming. There are several volumes of which taxpayer has no copies, either in the bound set or on microfilm. A negative and three positive prints were made. The negative is kept in a vault in its building. One positive print was donated to the Los Angeles Public Library and another to the Huntington Memorial Library. The third is kept by taxpayer in its building near the bound volumes. [R. 36-37.]

The expense of microfilming was \$40,000 in 1943 and \$44,179.04 in 1944. Taxpayer deducted these amounts in its federal income tax and excess profits tax returns for those years as business expenses. The Commissioner disallowed the full amount for 1943 and \$36,830.48 of the 1944 deduction was disallowed upon the ground that the amounts should be capitalized and recovered through amortization or depreciation deductions over a 25-year period; and as a result taxpayer was allowed an amortization deduction of \$1,792.70 for the year 1944. [R. 34-35.]

Taxpayer has continued to the present time to microfilm its current newspapers, the filming being done once a month, and the expense thereof is allowed by the Commissioner as an ordinary and necessary business expense. Taxpayer also continues to bind two sets of its current newspapers. [R. 37.]

The court also found that on February 25, 1942, enemy aircraft were reported to have flown over the Los Angeles area and to have been driven off by anti-aircraft defenses. Because of the fear of a bombing, discussions were commenced the following day between the then treasurer, secretary and comptroller of taxpayer (Mr. Downing) and his then assistant, the present treasurer and comptroller (Mr. Bowers) looking to the protection of taxpayer's newspaper files, and from those discussions evolved the determination to microfilm the newspapers. [R. 36.]

The microfilming of the newspapers was not done to conserve space, inasmuch as taxpayer has ample space in its present vault to accommodate two sets of its newspapers for a period of 40 to 60 years in the future, and it can then eliminate one set and thus have sufficient space for some 80 to 100 years in the future. The microfilming was not done to protect taxpayer against deterioration of its bound volumes, to be used in lieu of the bound volumes, because deterioration is not rapid, particularly with respect to the set which is not used. The microfilm is never used by taxpayer whenever there is a bound volume. It is resorted to from two to six times a year by the chief librarian of the Los Angeles Times to answer inquiries from the public regarding a period so long ago that taxpayer does not have a bound volume. It was used occasionally for two years by two members of taxpayer's editorial staff in preparing a column of what had appeared in the Times sixty years earlier, but this use occurred only when bound volumes were missing. Since 1950 the column was moved up to fifty years ago, and since bound volumes are available for all periods since 1910 the microfilm is no longer used for that purpose. The microfilm is difficult to read and cannot be used for

long periods of time without resting. The photographing of the bound volumes makes reading difficult and at times impossible, because the binding was not broken and the material in the middle of the pages is not readable. [R. 37-38.]

The court finally found that the microfilming was not done to, nor did it, improve the original plant of the taxpayer, or increase, extend or prolong its useful life; that it was not done to, nor did it, increase the net or gross income of the taxpayer; that it was done solely as a means of protection against the threatened bombing, to permit taxpayer to maintain its business on the same scale, but not to increase it; that it did not create an asset or capital value; and that it was an ordinary and necessary business expense. [R. 38-39.]

Statement of Points to Be Urged.

1. The District Court erred in finding that, because of the fear of a bombing, discussions were commenced the following day between the then treasurer, secretary and comptroller of taxpayer and his then assistant looking to the protection of taxpayer's newspaper files, and from those discussions evolved the determination to microfilm the newspapers.

2. The District Court erred in its finding that the microfilming was not done to, nor did it, improve the original plant of the taxpayer, or increase, extend or prolong its useful life; that it was not done to, nor did it, increase the net or gross income of the taxpayer; that it

was done solely as a means of protection against the threatened bombing, to permit taxpayer to maintain its business on the same scale, but not to increase it; that it did not create an asset or capital value; that it was an ordinary and necessary business expense.

3. The District Court erred in concluding that the expense of microfilming taxpayer's newspapers was an ordinary and necessary expense incurred in its trade or business under Section 23(a)(1) of the Internal Revenue Code of 1939, and was not a capital expenditure.

4. The District Court erred in holding that taxpayer was entitled to judgment against the United States for refund of excess profits tax and interest paid by it for the calendar years 1943 and 1944.

5. The District Court erred in entering judgment for the taxpayer for the resulting overpayment of excess profits tax and interest paid by it for the calendar years 1943 and 1944.

Summary of Argument.

Ordinary and necessary expenses in carrying on a business are deductible from gross income in order to determine net income. Capital expenditures, however, are not deductible. If an expenditure is for replacements, alterations, improvements or additions which prolong the life of property, increase its value, or make it adaptable to a different use, it is a capital expenditure.

Under normal circumstances the expense of microfilming a set of a newspaper's back issues, running back for sixty

years is clearly a capital expenditure, just as would be the expense of acquiring a duplicate set of those issues.

The present case is one calling for the application of that rule. In finding that taxpayer here incurred that expense solely as a means of protection against the threatened bombing, the court below relied upon testimony of one who did not make the decision or have any direct contact with those who decided to incur the expense of microfilming. In so finding the court below disregarded the overwhelming evidence that that was not the sole purpose of the microfilming. It disregarded the facts that the microfilming was contracted for a year and a half after the false alarm of an enemy air raid, and was begun and completed when there was no reasonable likelihood of an air raid. It disregarded the facts that the microfilming was not limited to taxpayer's existing file of newspapers, that the microfilming continued as a part of taxpayer's normal operations, that the films have been retained and are of some current use.

Even if the purpose of the microfilming were solely to meet a war-time situation, nevertheless the expenditure was a capital expenditure. Deductibility depends upon the nature of the asset acquired. Here taxpayer acquired an asset, permanent in character, which was an addition to its existing plant. In looking at the supposed purpose of the microfilming rather than at the nature of the asset acquired the court below erred. Its judgment should be reversed.

ARGUMENT.

The District Court Erred in Finding and Concluding That the Cost of Microfilming Taxpayer's Set of Back Copies of Its Newspaper Was an Ordinary and Necessary Expense and Not a Capital Expenditure.

The question here is whether the cost to taxpayer in 1943 and 1944 of microfilming its past issues of a sixty-year period is a capital expenditure or a current expense. If it is the former, under Section 24(a)(2) of the Internal Revenue Code of 1939, *supra*, it is not deductible, being an "amount paid out for * * * permanent improvements, or betterments made to increase the value of any property * * *." If the latter it is deductible under Section 23(a)(1)(A) of the Code, *supra*, as "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *."

The general principle to be applied in determining what are capital expenditures is well settled. If an expenditure is for "replacements, alterations, improvements or additions which prolong the life of the property, increase its value or make it adaptable to a different use," it is an addition to capital investment. *Illinois Merchants Trust Co., Executor, v. Commissioner*, 4 B. T. A. 103, 106. This principle has been applied in numerous situations. See, for example, *New Idria Quicksilver Min. Co. v. Commissioner*, 144 F. 2d 918 (C. A. 9th); *Schwabacher v. Commissioner*, 132 F. 2d 516 (C. A. 9th); *Crocker First Nat. Bank v. Commissioner*, 59 F. 2d 37 (C. A. 9th). See also 4 Mertens, Law of Federal Income Taxation, Sections 25.17-25.33;

Holzman, Repairs versus Capital Expenditures, New York University Ninth Annual Institute on Federal Taxation, p. 717.

The distinction between current, deductible expenses and capital expenditures of an exhaustible nature which are to be recouped as deductions, by way of depreciation or amortization, over the entire life of the property, is basic to the taxing system, for the distinction helps to avoid distortions of income. Expenses which contribute to the current year's income are properly deductible in full in that year, thus arriving at a fair reflection of that year's income. However, where the expense is one which has a more permanent effect in that it will contribute to the earning of income in future years as well as in the current year, a fair reflection of income in each year of the period requires that only a portion of the expenditure be deducted in each of the years during which the expenditure is contributing to the earning of income. Quite obviously, if the entire expense were to be deducted in the year when incurred, the net income for that year would be unduly diminished and, of course, since no offsetting deduction would be available to offset the income in later years which might be attributable to the earlier expenditure, the net income of such years would be unduly increased. In short, the income for each year would be distorted.¹

¹Such distortions of income can be disadvantageous to taxpayers as well as to the revenue. Thus, while the present taxpayer finds a present advantage in attempting to deduct in one year the full expenditure which will actually result in economic benefits over a 25-year period, other taxpayers, who do not incur the expense in a high income year, would find it disadvantageous if compelled to take the entire deduction in one year, for they would be deprived of the right to spread the deduction over the entire period when the benefits of the expenditure are actually being reaped.

The statute prevents the deduction of an expenditure which will result in the flow of benefits of a somewhat permanent nature. Specifically, the acquisition of an asset having a useful life of more than one year is not an "ordinary" expense, no matter how "necessary" it may be. One of the functions of the word "ordinary" in Section 23(a)(1)(A) is to distinguish between capital expenditure, *i. e.*, expenses whose benefits project into the future, and expenses whose benefits are exhausted currently. It is only where the expense is both "ordinary" and "necessary" that a deduction is afforded by Section 23(a)(1)(A). And, as we have seen, Section 24(a)(2) contains an explicit prohibition against deducting the kind of expenses which are made for permanent improvements. It is because such expenses are not fully deductible when incurred that Congress permits a deduction for depreciation or amortization to be spread over the useful life of exhausting assets.

The distinction between current expenses and the more permanent kind of capital expenditure is stated in Section 29.41-3(2), Treasury Regulations 111, as follows:²

(2) Expenditures made during the year should be properly classified as between capital and expense; that is to say, expenditures for items of plant, equip-

²This regulation has been in effect since 1920. See Treasury Regulations 45 (1920), Art. 24; Treasury Regulations 62 (1922), Art. 24; Treasury Regulations 69 (1926), Art. 24; Treasury Regulations 74 (1928), Art. 323; Treasury Regulations 77 (1932), Art. 323; Treasury Regulations 86 (1934), Sec. 41-3; Treasury Regulations 94 (1936), Sec. 41-3; Treasury Regulations 101 (1938), Sec. 41-3; Treasury Regulations 103 (1940), Sec. 19.41-3. It has remained the same through repeated reenactments of substantially the same statutory provisions. Accordingly it has the legal effect of a Congressional enactment. *Helvering v. Reynolds Co.*, 306 U. S. 110, 116; *Morgan v. Commissioner*, 309 U. S. 78, 81; *Commissioner v. Laguna Land & W. Co.*, 118 F. 2d 112 (C. A. 9th); *Schwabacher v. Commissioner*, 132 F. 2d 516, 519 (C. A. 9th).

ment, etc., which have a useful life extending substantially beyond the year should be charged to a capital account and not to an expense account; and

* * * * *

See also, Mertens, *supra*, Section 25.17, where the rule is stated:

An item of expenditure, in order to be deductible under this section of the statute providing for the deduction of ordinary and necessary business expenses, must fall squarely within the language of the statutory provision. This section is intended primarily, although not always necessarily, to cover expenditures of a recurring nature where the benefit derived from the payment is realized and exhausted within the taxable year. Accordingly, if the result of the expenditure is the acquisition of an asset which has an economically useful life beyond the taxable year, no deduction of such payment may be obtained under this provision of the statute. In such cases, to the extent that a deduction is allowable, it must be obtained under the provisions of the statute which permit deductions for amortization, depreciation, depletion, or loss.

It is clear that under ordinary circumstances the expense of microfilming a complete, or nearly complete, set of a newspaper's back issues for a period of sixty years in the past is a capital expenditure. The acquisition of such an asset having a useful life of 25 years represents the acquisition of a capital asset within the rule stated in the Treasury Regulations. This would be of the same nature as the acquisition of a library, or, more closely analogous, as obtaining another bound set of the newspapers. We do not suppose that if instead of microfilming

the bound volumes taxpayer had acquired from some other source a third file of its back issues taxpayer would argue that the cost of that set was in its nature a current expense. That the duplicate sets are on microfilm instead of on newsprint does not change the nature of the expenditure or make them any less of an addition to the property. As the Commissioner stated in his ruling, I. T. 3732, 1945 Cum. Bull. 88 (Appendix, *infra*), any expenditure for microfilming such files would of necessity be expenditures for the improvement or betterment of an existing facility.³

The court below, however, apparently thought that the present case presented unusual circumstances justifying a departure from the normal rule. It found that from the

³In his ruling the Commissioner also stated that the costs of periodic microfilming of future editions are deductible as ordinary and necessary business expenses. While such expenditures might also be considered as capital expenditures in the sense that they are for assets which have a long useful life, the periodic occurrence of this expense justifies their deduction out of practical considerations since the result is about the same as would ensue if the costs were being amortized on the basis of each year's expenditures. The situation is analogous to the costs of a set of law books. A lawyer acquiring at one time a full set of the United States Reports purchases a capital asset which should be depreciated. Thereafter, as he purchases its current volumes, it is more practical to permit the current year's costs to be deducted instead of amortized for the computations would become too complicated and the net tax result would not be sufficiently different to justify these complications. The distinction between microfilming back files and microfilming current issues is also somewhat analogous to the distinction between the cost of building a newspaper's circulation structure, which is capital expense (*Meredith Pub. Co. v. Commissioner*, 64 F. 2d 890 (C. A. 8th); *Public Opinion Pub. Co. v. Jensen*, 76 F. 2d 494 (C. A. 8th)), and the expense of maintaining the circulation, which is currently deductible (*Perkins Bros. Co. v. Commissioner*, 78 F. 2d 152 (C. A. 8th); *Willcuts v. Minnesota Tribune Co.*, 103 F. 2d 947 (C. A. 8th)).

In any event the files here involved cannot reasonably be considered current records.

discussions on February 25, 1942, following the report of enemy aircraft in the Los Angeles area evolved the determination to microfilm the newspapers [R. 36] and that it was done solely as a means of protection against the threatened bombing. [R. 38-39.] We submit that even if the findings are taken as correct, the conclusion of the court below is erroneous as a matter of law. We shall also show that these findings are clearly erroneous in any event.

The court erred as a matter of law in concluding [R. 39] that the expense was not a capital expenditure because it was incurred to protect the files against threatened bomb damage. The governing consideration was quoted by this Court in *Crocker First Nat. Bank v. Commissioner*, 59 F. 2d 37, 39, from *Parkersburg Iron & Steel Co. v. Burnet*, 48 F. 2d 163, 165 (C. A. 4th), as follows:

* * * whether or not a given outlay actually results in ultimate advantage to the taxpayer does not determine whether such outlay is to be treated as representing a permanent improvement; that is, a capital expenditure, or merely current upkeep, that is, repairs. The true test is rather the nature of the expenditure in and of itself, for, as the government rightly contends, an alteration may be made expressly for the purpose of increasing the value of a given property; and, though it may fail to accomplish that purpose, it nevertheless may remain a capital expenditure. The extent and permanency of the given alteration are indicative of its true character.

The *Parkersburg* case involved wartime changes. Taxpayer was a manufacturer engaged in a sheet mill business. Its plant was adequate and satisfactory for its business, which in 1918 was principally the production of

articles under Government war contracts. At the suggestion of Army engineers, in order to improve lighting conditions, it made extensive alterations in its plant. The productivity of the plant was not increased by reason of these alterations. Assuming that the alterations did not increase the efficiency, productivity or value of the plant, and that taxpayer had been put to a decided disadvantage by reason of the alterations, the Board of Tax Appeals held the expenditures for alteration not to be a current expense. The court approved, finding them to be a capital expenditure.

In that case, as here, the capital asset was a permanent change, and had not been abandoned. *Russell Box Co. v. Commissioner*, 208 F. 2d 452 (C. A. 1st), goes further. There the taxpayer in 1942 erected a substantial wire mesh fence around its plant, apparently at the suggestion of Government inspectors, to provide a tenant of its buildings, engaged exclusively in war work, with greater protection from sabotage. The fence was taken down sometime after the war because it proved to be a nuisance in that it impeded access to the plant both by rail and by truck. The court held the fence to be a capital improvement while it lasted, even though taxpayer may have planned to tear the fence down as soon as the war emergency was over, and did so, and even though the fence may not in the long run have enhanced the value of the property.

That those cases involved the physical structure does not, of course, mean that the principle is limited to physical structures. A trademark is a capital asset (*Seattle Brewing & Malting Co. v. Commissioner*, 6 T. C. 856, 872-873, affirmed, 165 F. 2d 216 (C. A. 9th)); the cost of de-

fending title is a capital expenditure (*Schwabacher v. Commissioner*, 132 F. 2d 516 (C. A. 9th)).

Taxpayer here made expenditures to acquire a microfilm negative and prints of its set of back issues, and to supplement this set with other issues. Even if it had done so solely in order to avoid a possible destruction of its files in the event of bombing, the expenditure would have been a capital expenditure. Even if it had abandoned the films after the war they would have continued to be a capital asset while they existed. In fact, however, the prints are retained and continue to be used and taxpayer continues to microfilm its current issues.

The court below also seemed to be influenced by its finding [R. 38-39] that the microfilming did not increase the net or gross income of the taxpayer but permitted it [R. 39] "to maintain its business on the same scale, but not to increase it." These findings do not justify the conclusions stated in the same paragraph, namely that the expenditures "did not create an asset or capital value" and that the expense was [R. 39] "an ordinary and necessary business expense."

The expenditure did create an asset, the microfilms; and that asset does have a useful life of 25 years. Even if the acquisition of the asset only maintains the business on the same scale, that does not change the character of the asset or make the expense an ordinary one. It would be a novel rule indeed which would permit the cost of a permanent asset to be deducted as a business expense merely because it maintained rather than increased the business income. The microfilms were an addition to the capital plant. They did not serve merely to maintain the

usefulness of the existing plant. Cf., *American Bemberg Corp. v. Commissioner*, 10 T. C. 361, affirmed, 177 F. 2d 200 (C. A. 6th); *Roundup Coal Mining Co. v. Commissioner*, 20 T. C. 388; *Illinois Merchants Trust Co., Executor v. Commissioner*, 4 B. T. A. 103. They were not in the nature of repairs to the bound volumes. Instead they were an improvement changing the nature of taxpayer's plant and equipment.

Although we do not believe that they have any relevant significance in a proper classification of the asset, it may be observed that the findings relating to the reason why the microfilming was undertaken are erroneous because they are based on the testimony of a witness who did not know the reason for the final decision to microfilm and because they are contrary to the circumstances shown by the record as a whole.

The sole witness on this part of the case was Harry W. Bowers, in 1942 the auditor of taxpayer. [R. 50-51, 62.] He testified that on February 25, 1942, after the false report of enemy aircraft, he discussed with his superior, Mr. Downing, the danger to the files from a possible bombing. [R. 56.] We do not question this testimony or his testimony that from that "it resulted eventually in the contract of having the back issues microfilmed." [R. 57.] And if in its finding that from these discussions "evolved" the determination to microfilm the newspapers [R. 36] the court below merely meant that these discussions first raised the question and thereafter by a process of evolution a decision to microfilm was eventually made, such a finding is justified by the testimony. But if the court in this finding means to support its later finding that the microfilming was done solely as a means

of protection against the threatened bombing [R. 38-39], we submit that the court erred. *Post hoc ergo propter hoc* is not a sufficient basis for a finding as to the business purpose of the microfilming, where the circumstances not only do not support the finding but are contrary to it.

The witness, Bowers, was unable to furnish the link between his discussion with Downing and the eventual decision. He did not confer with the directors on this question [R. 69]; he was not present at any discussions of the directors [R. 70]; he doubted that the directors made the decision, and thought it was made by Norman Chandler [R. 70];⁴ but he never discussed it with Mr. Chandler or with anyone but Downing. [R. 81.]

Furthermore, the other evidence in the record, as to timing, extent of microfilming, and current practice, is contrary to the inference that the microfilming was a temporary measure solely as a protection against the threatened bombing.

Conceding that on February 25, 1942, Mr. Bowers and Mr. Downing were concerned about the bombing and assuming that this sparked the idea of having the files microfilmed, it is significant that the contract for microfilming was not entered into until July, 1943, a year and a half later, work did not start until September, 1943, and was not completed until the fall of 1944. [R. 68.] By September, 1943, the Japanese fleet had been crippled by the battles of Coral Sea, Midway, Solomons, and Bismarck Sea. The Japanese had evacuated Guadalcanal and the American counteroffensive was under way. In Europe

⁴Mr. Chandler is not identified in the record. He was at the time manager of the newspaper.

the Allies had landed in Italy. It is difficult to conclude that at that time the expense of microfilming would have been incurred as a purely temporary measure to meet the threat posed by a false alarm a year and a half earlier. It is even more difficult to believe that the expense for that purpose would have been allowed to increase during the period of Japanese retreat in 1944.

Furthermore, if the purpose were merely to safeguard the newspaper's existing files, there was no need to microfilm the 30,579 pages missing in taxpayer's bound sets but available from the State Library at Sacramento and two other libraries. [R. 66.] For the period subsequent to 1910, too, the claimed purpose could have been achieved by storing the duplicate set of back issues, which is not used, in a safer place, rather than incurring the expense of microfilming.

That the microfilms are used relatively little compared to the bound copies [R. 37-38] does not show that the microfilming was a temporary expedient. On the contrary, not only does taxpayer currently microfilm its newspapers, in addition to the bound copies [R. 87-88], but efforts are being made to find missing issues of which taxpayer has no copies, either bound or microfilmed, in order to make the file complete. [R. 92.] It seems fairly plain that taxpayer, in microfilming its back issues, was acquiring an asset which would be helpful in its business for a fairly long period of time. Such an asset is clearly a capital asset.

Conclusion.

The judgment of the District Court should be reversed.

Respectfully submitted,

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February, 1955.

APPENDIX.

I. T. 3732 (1945 Cum. Bull. 88):

Internal Revenue Code.

In the case of a newspaper publisher, the cost of microfilming newspaper files which may reasonably be considered current records and the cost of periodic microfilming of future editions are deductible as ordinary and necessary business expenses for the year in which such expenditures are paid or incurred, but the cost of microfilming old newspaper files which are not classifiable as current records should be capitalized and recovered through depreciation allowances.

Advice is requested whether amounts paid or incurred by newspaper publishers with respect to the microfilming of newspaper files and for periodic microfilming to keep such files current are deductible as ordinary and necessary business expenses for Federal income tax purposes.

The old files of newspapers maintained by newspaper publishers represent libraries which are used by the journalistic staffs of such publishers in preparing articles for publication. In many instances the oldest files are deteriorating rapidly and storage space is practically exhausted. Inasmuch as newspaper files are permanent records, it is important that such files be safeguarded as far as possible against deterioration and the hazards of fire, flood, etc. The substitution of microfilm copies for the original records enables newspaper publishers to conserve space and insures the permanency of their files. Any expenditures paid or incurred for microfilming the

files would of necessity be expenditures for the improvement or betterment of an existing facility of the business.

Section 23(a)(1)(A) of the Internal Revenue Code provides that in computing net income there shall be allowed as deductions:

(A) In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *.

Section 29.23(a)-1 of Regulations 111 provides that business expenses which are deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except the classes of items which are deductible under section 23(b) to section 23(z) of the Code and the regulations thereunder. The principle is well established that expenditures, in order to be deductible as business expenses, must be both ordinary and necessary in the taxpayer's trade or business during the taxable year for which the return is made. (See *Welch v. Helvering*, 290 U. S. 111, Ct. D. 755, C. B. XII-2, 112 (1933).) Section 24(a)(2) of the Code provides in part that no deduction shall in any case be allowed in respect of any amount paid out for permanent improvements or betterments made to increase the value of any property. Section 29.41-3 of Regulations 111 provides in part that expenditures made during the taxable year should be properly classified as between capital and expenses, *i. e.*, expenditures for items of plant, equipment, etc., which have a useful life extending substantially beyond the year should be charged to a capital account and not to an expense account.

In view of the foregoing, it is held that in the case of a newspaper publisher the cost of microfilming newspaper files which may reasonably be considered current records and the cost of periodic microfilming of future editions are deductible as ordinary and necessary business expenses for the year in which such expenditures are paid or incurred, but the cost of microfilming old newspaper files which are not classifiable as current records should be capitalized and recovered through depreciation allowances under section 23(1) of the Internal Revenue Code.



No. 14582.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

THE TIMES-MIRROR COMPANY, a corporation,

Appellee.

On Appeal From the Judgment of the United States District
Court for the Southern District of California.

BRIEF FOR APPELLEE.

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Appellant,

vs.

THE TIMES-MIRROR COMPANY, a corporation,

Appellee.

On Appeal From the Judgment of the United States District
Court for the Southern District of California.

BRIEF FOR APPELLEE.

Opinion Below.

The findings of fact and conclusion of law of the District Court [R. 33-40] are not officially reported.

Jurisdiction.

This appeal involves excess profits taxes for the calendar years 1943 and 1944 in the amount of \$62,357.30, plus interest. The taxes in dispute were paid on October 21, 1949. [R. 35.] Claims for refund were filed on January 26, 1950, and were rejected by notice dated June 27, 1952. Within the time provided in Section 3772 of the Internal Revenue Code of 1939, and on November 20, 1952, the taxpayer brought an action in the District

Court for recovery of the taxes paid, plus interest thereon as provided by law. [R. 3-22.] Jurisdiction was conferred on the District Court by 28 U. S. C., Sections 1340 and 1346(a)(1). The judgment was entered on July 29, 1954. [R. 41-42.] Within sixty days and on August 26, 1954, a notice of appeal was filed. [R. 42-43.] Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

Question Presented.

Whether the decision of the District Court to the effect that the cost to taxpayer of microfilming its file of bound copies of back issues of newspapers was an ordinary and necessary business expense is supported by substantial evidence and not clearly erroneous.

Statutes Involved.

Internal Revenue Code of 1939:

“SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) Expenses.—[As amended by Sec. 121(a), Revenue Act of 1942, c. 619, 56 Stat. 798.]

(1) Trade or Business Expenses.—

(A) In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *.” (26 U. S. C., 1952 ed., Sec. 23.)

“SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) General Rule.—In computing net income no deduction shall in any case be allowed in respect of—

* * * * *

(2) Any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate, * * *.”
(26 U. S. C., 1952 ed., Sec. 24.)

Statement.

Appellee does not controvert the statement of facts contained in appellant's brief at pages 3 through 6.

Summary of Argument.

The expenditures to microfilm back issues of appellee's newspapers were made to protect its library from a threatened bombing. Appellee had experienced an earlier bombing and knew of its harmful effect upon records vital to the operation of a newspaper. The microfilms did not improve appellee's plant nor increase, extend or prolong its useful life. They did not increase appellee's net or gross income, but allowed appellee to maintain its business on the same scale, not increase it. No capital asset or capital value was created. Therefore the amounts expended for microfilming were ordinary and necessary expenses in carrying on appellee's business as a newspaper, and as such are deductible in computing taxable net income. The fact that the Commissioner of Internal Revenue allows the cost of microfilming "current" records to be deducted establishes the general nature and purpose of the item, and deductibility cannot be denied merely because of some incidental use of the microfilms in years subsequent to the taxable years before the Court.

The Findings of Fact, Conclusion of Law and Judgment of the District Court are supported by substantial evidence; they are not clearly erroneous; and they should be affirmed.

ARGUMENT.

Appellant's argument is twofold: First, that certain of the Findings of Fact are not supported by the evidence; and Secondly, that in no event are the microfilming expenses involved herein deductible as ordinary and necessary business expenses. Since the second of these arguments requires an analysis of the basic concept of what expenses are deductible, we will discuss that argument first. The Findings of Fact, and appellant's contentions in respect thereof, will be dealt with subsequently.

I.

The Expense of Microfilming Appellee's Newspapers Is an Ordinary and Necessary Business Expense.

Section 23(a)(1)(A) of the Internal Revenue Code of 1939, which is applicable to the instant case, involving the taxable years 1943 and 1944, provides that in computing net income there shall be allowed as deductions “* * * All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *.”

Appellant argues that the microfilm expenses here involved are not ordinary and necessary business expenses, but are capital expenditures, *i. e.*, amounts paid out for “* * * permanent improvements, or betterments made to increase the value of any property, * * *” and, as such are not deductible under Section 24(a)(2) of the Internal Revenue Code of 1939.

The question of what constitutes an ordinary and necessary business expense resulting in deductibility on the one hand, and what constitutes a capital outlay resulting in nondeductibility on the other, has been one of

the more fertile fields of tax litigation for many years. As a result, certain principles have been pronounced by the courts over the years, which have established the criteria to be used in determining deductibility. Appellee contends that the expenditures for microfilming in the instant case satisfy all of the criteria for deductibility and that therefore the District Court's decision was correct and should be affirmed.

The two key words in Section 23(a)(1)(A) are "ordinary" and "necessary." We do not understand appellant to contend that the microfilm expenses were not "necessary." The decision to microfilm was one made by the management of a newspaper which had experienced a bombing in 1910, and sought protection from a recurrence of damage to its library.¹ The Courts are (and taxing authorities should be) slow to override the exercise of experienced business judgment. (*Welch v. Helvering*, 290 U. S. 111 (1933).)

We perceive appellant's primary argument to be that because of the size and nonrecurring nature of the expenditure (in such an amount), as well as the fact that appellee may obtain some benefit (even though incidental) in years subsequent, the general purpose of the expenditure

¹As a result of the October 1, 1910, bombing of appellee's plant, all back issues for the years 1884 and 1889 to 1893 were missing; some issues for the years 1881, 1882 and 1885 were badly damaged by fire damage, *i.e.*, some watermarked, others brittle, and still others with pages torn. [R. 52-54.] Mr. Downing, then Treasurer, Comptroller and Secretary of appellee, had experienced the 1910 bombing; and Mr. Bowers had investigated the effects of the 1910 bombing of appellee's plant and knew the effect of bombing in other countries on records and buildings. [R. 55, 71-72.]

must be to obtain a capital asset.² Let us examine some of the significant cases dealing with these considerations.

The Supreme Court of the United States in the case of *Welch v. Helvering*, 290 U. S. 111, 78 L. Ed. 212, with reference to Section 23(a) of the Code, stated (p. 114):

“* * * Ordinary in this context does not mean that the payments must be habitual or normal in the sense that the same taxpayer will have to make them often. A lawsuit affecting the safety of a business may happen once in a lifetime. The counsel fees may be so heavy that repetition is unlikely. None the less, the expense is an ordinary one because we know from experience that payments for such a purpose, whether the amount is large or small, are the common and accepted means of defense against attack. (Cf. *Kornhauser v. United States*, 276 U. S. 145, 72 L. ed. 505, 48 S. Ct. 219.) The situation is unique in the life of the individual affected, but not in the life of the group, the community, of which he is a part. At such times there are norms of conduct that help to stabilize our judgment, and make it certain and objective. The instance is not erratic, but is brought within a known type.” (290 U. S. at pp. 113-114.)

Surely if the expenses of defending a “lawsuit affecting the safety of a business” (although it “may happen once in a lifetime”) are deductible, the cost of microfilming

²Total microfilming cost was \$84,147.04; \$73,156.19 for the negatives and \$11,022.85 for 3 positive prints. [R. 52.] This is compared with total expenses of all kinds for appellee of \$8,990,344.00 for 1943 and \$8,768,475.00 for 1944, or a total of \$17,758,819.00. [R. 65.] Thus microfilm expenses constitute less than one-half of one per cent of total expenses for the two years before the Court.

back issues of newspapers merely for the purpose of preserving plaintiff's business is deductible.

The Tax Court of the United States has consistently held as deductible expenditures which were not made to improve, better, extend or increase the original plant or to prolong its useful life. One of the recent decisions of the Tax Court was the case of *American Bemberg Corporation v. Commissioner*, February 25, 1948, 10 T. C. 361, affirmed 177 F. 2d 200 (C. A. 6, 1949). In this case it appeared that very disastrous cave-ins had occurred under the taxpayer's plant, making the plant unsafe for operations. The taxpayer, to remedy this, expended in 1941 the sum of \$734,316.76 and in 1942 \$199,154.33. The Commissioner in that case, as in the present case, contended that the expenditures were not ordinary and necessary expenditures but should be capitalized. The Tax Court, in its opinion stated (pp. 376-378):

"In connection with the purpose of the work, the Proctor program was intended to avert a plant-wide disaster and avoid forced abandonment of the plant. The purpose was not to improve, better, extend, or increase the original plant, nor to prolong its original useful life. Its continued operation was endangered; the purpose of the expenditures was to enable petitioner to continue the plant in operation not on any new or better scale, but on the same scale and, so far as possible, as efficiently as it had operated before. The purpose was not to rebuild or replace the plant in whole or in part, but to keep the same plant as it was and where it was. * * *

"* * *

"We think a consideration of the above factors, which are more fully set out in our findings, shows that the expenditures in question fall into the 'expense' class rather than the 'capital' class. The

original geological defect has not been cured; rather its intermediate consequences have been dealt with. The required continuance of the three-fold inspection program and the requirement that even normal leakage be kept from the plant site show that the original defect still exists and that plant operation has had to be modified to take account of the continued existence of that original defect.

“One of the leading cases in the field of what are capital expenditures and what are business expenses is *Illinois Merchants Trust Co., Executor*, 4 B. T. A. 103; acquiesced in, 2 C. B. 2. That case has been often cited and approved. In that case the taxpayer owned a warehouse resting on wooden piles. During the taxable year unprecedently low water exposed parts of the piles usually under water. Dry rot set in and the warehouse began to settle so badly as to threaten collapse. To prevent a total loss and halt this accelerated deterioration, the taxpayer had all piles sawed off below the low water mark and installed concrete sections between the stumps of the piles and the bottom of the building. Much of the floor was removed in the process and one exterior wall was considerably shored up. It was held in that case that the expenditures there involved were not for permanent betterments and improvements, but were repairs and deductible as ordinary and necessary business expenses. For similar holdings see *Yakima Hop Co.*, 8 B. T. A. 441; *John A. Schmid*, 10 B. T. A. 1152; *Tampa Electric Co.*, 12 B. T. A. 1002; *Zimmern v. Commissioner*, 28 Fed. 2d 769, reversing 9 B. T. A. 1382; and *Buckland v. United States*, 66 Fed. Supp. 681.

“In the *Buckland* case, *supra*, the cost of stopping leaks in the walls and roof of a factory building within 16 months of its purchase was held deductible as a repair expense and was not a capital expenditure,

even though amounting to 35 per cent of the value of the building, where such repairs enabled a continuation of the existing use of the building by taxpayer's tenants. Notwithstanding the high cost, it was found that the nature of the work was the restoration of a damaged fabric not extending to the replacement of any sizeable unit of the building and conformed closely to the Board's definition of repairs in *Illinois Merchants Trust Co., Executor, supra*. In the *Buckland* case the court, among other things, said:

* * * * *

'Defendant's [U. S.] contention appears to be that repairs are only those mendings of the fabric which recur year by year. This is not consistent with the meaning given "ordinary and necessary" in *Welch v. Helvering, Commissioner*, 290 U. S. 111. The work done at the instance of the taxpayer was a normal response to the need developed in the course of stopping the leaks in the walls and roof of the factory building, to enable the continuation of the existing use of the building by the taxpayer's tenants.'"
(10 T. C. at 376-378.)

Despite the admonition of the Supreme Court of the United States in *Welch v. Helvering, supra*, and many other cases before the Tax Court of the United States, the defendant has attempted, as he is now attempting in this case, to classify every substantial expenditure as a capital expenditure. This is evidenced by the decision of the Tax Court in the case of *Roundup Coal Mining Co. v. Commissioner*, 20 T. C. 388 (1953), in which the Court stated:

"Respondent contends that the expenditure for the 1944 air shaft must be considered a major capital

item of improvement which enhanced the value of the mine and cannot be considered a minor item of equipment used solely for the purpose of maintaining normal production. * * *

“* * * Respondent now, as he has so persistently in the past, seeks to add another condition which must be met before taxpayer may be permitted to expense the cost of facilities ‘necessary to maintain the normal output’ of a mine. That condition is that the taxpayer must show the expenditure to have been *minor* rather than *major*. We find no authority for his contention. The terms are entirely relative and indeterminable. We must decide this issue upon the basis of Regulations 111, section 29.23(m)-15(a) and (b), because that regulation sets forth the only recognized pattern upon which to base decision.” (20 T. C. at 394.)

With the above authorities in mind, let us examine the nature of the expenditures here involved.

The preservation of records is one of the most common and universal practices of American industry. Such preservation has been accomplished in many ways. Before the advent of typewriters, businessmen preserved their records by making an extra copy of documents in long-hand. With the advent of typewriters duplicate copies have been made. With the progress of science the photo machine and the microfilm have been and are now used. Surely the method of preserving records does not make the practice any the less ordinary and necessary. The practice of preserving records has been an ordinary and necessary function of business ever since men began to trade.

There is no difference between the daily, monthly or annual preservation of records and the preservation of records of prior years. A business concern that in December microfilms its records for the full year is merely performing an ordinary and necessary business function. Likewise the microfilming of records of the year before last and preceeding years is an ordinary and necessary function. It is an ordinary and necessary business function to preserve records. Indeed, the Federal and State Governments require the maintenance and preservation of records and have always recognized such practice as ordinary and necessary.³

Suppose, for instance, that a company had a long-term lease or contract which because of its constant use during past years was deteriorating and as a consequence new copies were made either by retyping, photostating or microfilming; would the cost of reproducing this old document be considered a capital investment? Surely not! Would there be any difference in principle if there had been more than one document or even a hundred? Surely not! It is common practice for business firms to make several copies of documents. Surely the number of copies that are made for record preservation does not detract from the ordinary and necessary business function. Nor does the fact that the microfilming of old records occurred only once detract from its ordinary and necessary function. Neither does the cost of such microfilming in any way detract from its ordinary and necessary function.

³26 U. S. C. Secs. 51, 53(a); Reg. 111, Secs. 29.41-3 and 29.54-1.

To paraphrase the language of the Supreme Court (*Welch v. Helvering*, 290 U. S. 111, 78 L. Ed. 212),

“the microfilming of old records to preserve the ‘safety of a business may happen once in a lifetime.’ The cost of such microfilming may be ‘so heavy that repetition is unlikely. None the less, the expense is an ordinary one because we know from experience that payments for such a purpose, whether the amount is large or small, are the common and accepted means of defense against’ the loss of such records.”

It is clear from the Supreme Court’s decision in the *Welch* case, *supra*, that the expenditures made in defending the “safety” of a business are ordinary and necessary expenses despite the fact that such expenditures may occur only once in a lifetime. The lawsuit alluded to in the *Welch* case was an attack against the safety of the business. Surely the expenditures made in defending against a *threatened* attack upon the safety of a business would likewise be ordinary and necessary expenditures. In principle there can be no difference between an attack and a threatened attack. Expenditures in either instance would be for the same purpose, to wit, the preservation and safety of the business.

The same principle has been applied in a great number of cases dealing with newspaper publishing companies in another connection. These cases hold that amounts expended to *maintain* circulation at a given volume are ordinary and necessary expenses, as opposed to expenditures which are incurred to *increase* circulation which are capital in nature. It is obvious that new subscribers will be of benefit to the newspaper for a period of time in the future, but if their subscriptions are obtained primarily

for the purpose of *maintaining* the current volume of circulation, the courts have uniformly held that the cost represents an ordinary and necessary expense of doing business, deductible in full in the year it is incurred. *Perkins Bros. Co. v. Commissioner*, 78 F. 2d 152 (C. C. A. 8, 1935); see also *Willcuts v. Minnesota Tribune Co.*, 103 F. 2d 947 (1939), Cert. Den., 308 U. S. 577. This is true even though, as in the *Perkins* case, the costs expended to *maintain* circulation incidentally resulted in some actual *increase* in circulation, the Court stating:

“* * * We must bear in mind that we are here considering the character of an expenditure, and that is dependent upon its general purpose rather than upon an incidental result.” (78 F. 2d at p. 155.)

Clearly the microfilm expense was incurred to *maintain* and to *protect* appellee's library of back issues; this was its general purpose and governs the character of the expense. The mere fact that some incidental use or benefit may be enjoyed should not be allowed to obfuscate the true character of the expense or defeat its deductibility.

The District Court has found that

“The microfilming was not done to, nor did it, improve the original plant of plaintiff [appellee], or increase, extend or prolong its useful life. It was not done to, nor did it, increase the net or gross income of plaintiff. It was done solely as a means of protection against the threatened bombing, to permit plaintiff to maintain its business on the same scale, but not to increase it. It did not create an asset or capital value. It was an ordinary and necessary business expense.” [R. 38-39.]

Clearly these facts satisfy the criteria for deductibility discussed in the cases referred to above.

Appellant appears stubbornly to contest the trial court's finding that the microfilm expenditures "* * * did not create an asset or capital value." Because, of course, such a finding, if supported by the record, deals a fatal blow to this appeal. Therefore appellant repeats over and over in its brief that a capital asset was created. (Br. 12, 13, 14, 15, 16, 19.) A capital asset is not made by appellant's mere *ipse dixit*. Such a rule has not replaced logic, reason and evidence as the recognized basis for deciding lawsuits.

The main touchstone of appellant's argument that the microfilm expenses must be capitalized is that appellee may enjoy some incidental benefit or use of the microfilms during a taxable year subsequent to those during which the expenditures were incurred. But this is not the controlling test. Recently, the Commissioner of Internal Revenue sought to compel capitalization of expenses incurred, by a designer, manufacturer and installer of laboratory equipment, in the printing and distributing of a catalog of its products and installations, on the theory that the benefit to the taxpayer, as a result of the catalog, would be enjoyed by the taxpayer, in years subsequent to those during which the expenditures were made. In holding that the expenditures were deductible as ordinary and necessary business expenses, the United States Court of Appeals for the Sixth Circuit stated in part as follows:

"* * * The fact that an expenditure produces something that has a useful life extending beyond the taxable year is clearly not the controlling test. [citing cases]. It has been held a number of times that advertising expense, even though incurred heavily in a certain year with resulting benefits over

future years, is nevertheless a deductible expense for the year in which expended [citing cases].” (*E. H. Sheldon v. Commissioner*, 214 F. 2d 655, 659 (1954).)

Cases Relied Upon by Appellant.

In *Crocker First National Bank v. Commissioner*, 59 F. 2d 37 (1932), this Court held that amounts expended by a bank to deepen the foundation of its building so as to conform to the local building regulations, were to be capitalized. However, the Court observed that the amounts expended “* * * resulted in permanent physical alteration of the premises, undoubtedly increasing the value thereof.” (59 F. 2d at p. 39.) No premises or other property of appellee’s was permanently altered, nor was it increased in value. Accordingly, this case is inapposite.

In *Schwabacher v. Commissioner*, 132 F. 2d 516 (1943), this Court held that the expenses of attorney’s fees, litigation and settlement to *procure* a seat on the New York Stock Exchange (a capital asset), were expenses incurred in *perfecting* title to a capital asset, and hence should be added to the cost thereof and not deducted as an expense. We do not believe appellant’s citation to this case to support the statement: “the cost of *defending* title is a capital expenditure” (emphasis supplied) (Br. pp. 15-16) is accurate. In fact this Court in its opinion called attention to the fact that there is a distinct difference between expenses incurred for *perfecting* or acquiring title and those incurred in *protecting* title, holding that the latter are deductible whereas the former must be capitalized. This difference has significance in the present case, in view of an analogy appellant makes

on page 12 and in the footnote on page 13 of his brief. Appellant compares the microfilming expenses to those of a lawyer *acquiring* a library, *i. e.*, a full set of United States Reports. But that is not this case. Appellee did not, by the microfilming, *acquire* a library; rather it *maintained* and *protected* the library it already had.

This Court held, in *New Idria Quicksilver Mining Co. v. Commissioner*, 144 F. 2d 918 (1944), that the taxpayer's advance payments to a power company, so that it would install a transition line to the taxpayer's property, constituted an "operating expense" which "should have been prorated over the probable life of the operation." (144 F. 2d at p. 921.) This appears to be a ruling concerning the proper allocation of an advance payment for power service. This case does not appear to support appellant's argument.

Appellant also relies upon two cases involving expenditures made by newspapers to *acquire* or *increase* their circulation structure. (*Meredith Pub. Co. v. Commissioner*, 64 F. 2d 890 (C. C. A. 8, 1933) Cert. Den. 290 U. S. 676; and *Public Opinion Pub. Co. v. Jensen*, 76 F. 2d 494 (C. C. A. 8, 1935).) Such expenditures are made solely to increase the circulation, admittedly a capital asset, and to increase earnings. Neither circulation nor earnings were increased as a result of appellee's microfilming. The expenses of microfilming are more closely analogous to those of *maintaining* a newspaper circulation, which expenses, as pointed out above, are deductible as ordinary and necessary business expenses.

Appellant also relies upon *Parkersburg Iron & Steel Co. v. Burnet*, 48 F. 2d 163 (C. C. A. 4, 1931) and *Russell Box Co. v. Commissioner*, 208 F. 2d 452 (C. C. A. 1, 1953). These cases are somewhat similar. Both

taxpayers, while engaged in war work, upon the suggestion of government officials, made substantial physical improvements which increased the value of their respective properties. In the *Parkersburg* case the changes made included the tearing out of two floors of a building, strengthening general structure by introduction of steel beams, placing skylights in a roof, installing new foundations for certain machinery, laying a new concrete floor, and re-arranging certain line shafting. In the *Russell Box Co.* case the physical improvement was the erection of a substantial wire mesh fence around the taxpayer's plant. In both cases, the trial court found as a fact that substantial capital assets had been acquired as a result of the expenditures, and in both cases the Circuit Court of Appeals, giving appropriate weight to the trial court's determination of an issue of fact, affirmed, since the lower court's decision was not clearly erroneous. Aside from the differences in fact, which are glaring, the instant case is in the opposite posture before this Court, and these two cases should give appellant little comfort. Thus, the District Court's judgment, based upon findings that no capital asset has been created by the microfilming expenses, and its findings that the expenses are ordinary and necessary, should be affirmed by this Court, because it certainly cannot be said that the District Court's findings are clearly erroneous.

The Commissioner's Ruling.

The Commissioner of Internal Revenue has ruled that

“* * * in the case of a newspaper publisher the cost of microfilming newspaper files which may reasonably be considered current records and the cost of periodic microfilming of future editions are deductible as ordinary and necessary business ex-

penses for the year in which such expenditures are paid or incurred * * *". (I. T. 3732 (1945 Cum. Bul. 88)),

This ruling is quoted in the Appendix of Appellant's brief.

In the instant case the District Court has found as a fact that, in addition to the microfilming completed in 1943 and 1944, the taxable years before this Court:

"Plaintiff has continued to the present time to microfilm its current newspapers, the filming being done once a month, and the expense thereof is and has been allowed by the Commissioner of Internal Revenue as an ordinary and necessary business expense. Plaintiff also continues to bind two sets of its current newspapers." [R. 37.]

Appellee urges that this ruling, together with its specific application to this taxpayer, through the Commissioner's allowance just referred to, establish beyond question the general nature and purpose of microfilm expense, as being ordinary and necessary in the conduct of a newspaper business. However, the Commissioner, in the same ruling referred to above, goes on to hold that:

"* * * the cost of microfilming old newspaper files which are not classifiable as current records should be capitalized and recovered through depreciation allowances under Section 23(1) of the Internal Revenue Code." (I. T. 3732 (Cum. Bul. 88, 1945).)

Appellee's answer to the portion of the Commissioner's ruling just quoted is that to this extent the Commissioner's ruling is in error. The applicable statute pro-

vides that amounts paid to increase the value of any property or estate cannot be deducted. (Sec. 24(a)(2) of the Int. Rev. Code of 1939.) They must be capitalized. The amounts expended for microfilms did not create an asset or capital value; they did not increase the net or gross income; they did not improve the original plant, or increase, extend or prolong its useful life; they permitted appellee to maintain its business on the same scale, but not to increase it; the District Court has found these to be the facts. [R. 38-39.] In view of these facts, which are supported by substantial evidence, it is clear that appellee's property was not increased in value and therefore the statute does not preclude deductibility. Nor is there any basis in logic or reason for the distinction the Commissioner attempts to make in the ruling referred to above. He cannot by mere administrative fiat change the general nature, purpose and character of a newspaper's microfilm expenses from ordinary and necessary business expenses to capital outlays; to the extent that he has attempted to do so, he has exceeded his authority; and, accordingly, the last quoted portion of his ruling should not be followed by this Court, as it was not followed by the Court below. The enormity of the last portion of the ruling appears when we attempt to apply it. Is a large metropolitan newspaper which microfilms every month to be treated differently from a small town newspaper which, for exactly the same purpose, but in order to avail itself of economy through volume, waits until every third, or fifth or tenth year to microfilm its old issues? Merely to state such a proposition refutes it.

II.

The District Court's Findings of Fact Are Supported by Substantial Evidence; They Are Not Clearly Erroneous.

The District Court found as a fact that:

“V.

On February 25, 1942, enemy aircraft were reported to have flown over the Los Angeles area and to have been driven off by anti-aircraft defenses. Because of the fear of a bombing, discussions were commenced the following day between the then Treasurer, Secretary and Comptroller of plaintiff and his then assistant (the present Treasurer and Comptroller) looking to the protection of plaintiff's newspaper files, and from those discussions evolved the determination to microfilm the newspapers.”
[R. 36.]

Appellant's objection to this finding is somewhat elusive. It is admitted that “* * * such a finding is justified by the testimony,” if the Court merely meant that these discussions first raised the question and thereafter by a process of “evolution” a decision to microfilm was eventually made. (Br. p. 17.) That is all the Court found as a fact in the contested finding, so it appears that appellant's objection to it dissolves by its own admission.

Notwithstanding appellant's admission, it is submitted that this finding is a fair statement of the testimony of the witness Harry W. Bowers, Treasurer and Comptroller of The Times-Mirror Company, appellee, at pages 55-59, and 63 of the printed record. Since, in view of appellant's admission, we do not believe this finding to be seriously disputed, we will not reproduce that testimony

here, but will proceed to what we believe to be the real objection of appellant.

The District Court also found as a fact that:

“IX.

The microfilming was not done to, nor did it, improve the original plant of the plaintiff, or increase, extend or prolong its useful life. It was not done to, nor did it, increase the net or gross income of the plaintiff. It was done solely as a means of protection against the threatened bombing, to permit plaintiff to maintain its business on the same scale, but not to increase it. It did not create an asset or capital value. It was an ordinary and necessary business expense.” [R. 38-39.]

This finding is amply supported by the evidence, which is uncontroverted in the record. Examples of pertinent testimony of Harry W. Bowers, appellee’s Treasurer and Comptroller, are as follows:

“Q. Now I will ask you if the microfilming of the old records was done to improve or prolong the assets of The Times-Mirror Company? A. No. They will not improve the assets or prolong them.” [R. 62.]

“Q. * * * After you had procured the negative and your 3 positive prints, did you dispense with any of the old bound issues you say you had in two sets? A. No. We have not.

Q. You have kept them just the same? A. We kept them and continued to use them as we had before.

Q. Was this microfilming done for the purpose of conserving or preserving space? A. No. It was not.

Q. In other words, you kept your old records just the same, in 2 sets? A. We maintained the procedure, that is of making 2 sets." [R. 58-59.]

* * * * *

"Q. Well, have the bound volumes been used any less because of the microfilming? A. No." [R. 61.]

* * * * *

"Q. * * * I will ask you, Mr. Bowers, if the microfilming of the old records you have talked about here was done for any other purpose than to protect the Plaintiff [appellee] and its records? A. No. It was not." [R. 63.]

* * * * *

"Q. * * * Now, Mr. Bowers, do I understand your testimony that it was because of the general alarm about an air raid at Los Angeles at that time, you decided to microfilm your old past issues? A. Due to that warning, the danger was discussed and from that it resulted eventually in the contract of having the back issues microfilmed.

Q. And then you did go ahead, you had the microfilming done and you had the negatives developed? A. Yes, that is right, and we had 3 prints made.

Q. And where did you put the negative films? A. The negative films are lodged in the Treasurer's safe in The Times-Mirror.

Q. On what floor? A. On the 4th floor.

Q. Did you also have some positive prints made from the negatives? A. We had 3 made. One is lodged in the editorial department on the 3rd floor of The Times Building outside of their vaults, one set is lodged with the Los Angeles Public Library, and one with the Huntington Library.

Q. Will you tell the Court why you lodged a copy of the positive prints in the Public Library and a copy in the Huntington Library? A. It was mainly to spread the copies. If our building was destroyed, we would take the chance that perhaps one copy would be preserved at the Public Library or maybe at the Huntington Library. That was further east from the coast, so we lodged one out there.

Q. Did the Public Library or the Huntington Library pay The Times-Mirror anything for the positive prints? A. No. They did not." [R. 57-58.]

* * * * *

"Q. * * * I will ask you, Mr. Bowers, if any part of the costs of the microfilming was charged on the books as capital? * * * A. They were not charged as capital on the records of the Company." [R. 63-64.]

"Q. I believe you stated that the purpose of the microfilming was to avert a bombing result or to safeguard having copies of the Times in the event of a bombing? A. To preserve those records, yes." [R. 77.]

* * *

"Q. * * * At the time you decided to microfilm those old newspapers, wasn't one consideration that sooner or later the paper itself would wear out or decay? * * * A. No. I never heard that discussed and I will tell you why it wouldn't be discussed. There is the second volume." [R. 78-79.]

Appellee respectfully suggests that the above-quoted finding of fact is amply supported by substantial evidence.

Appellant can point to no evidence which contradicts the testimony of Mr. Bowers. This being so appellant seeks to negate its effect by claiming that the report of the bombing on February 25, 1942, was "a false alarm"; and by attempting to create the impression that the war was practically over by September, 1943, when microfilming was begun.⁴ There is no evidence whatsoever in this record indicating that the report of the bombing was "a false alarm." On the contrary, Exhibits 1, 2 and 3 (not printed in the Record) vividly create the opposite impression. The war was far from over in September, 1943; nor were the Japanese in retreat.⁵

Application of Rule 52(a) of the Federal Rules of Civil Procedure.

The District Court's finding that the amount expended for microfilming "* * * was an ordinary and necessary

⁴The delay in beginning microfilming was explained by Mr. Bowers. He stated that microfilming in the early 1940's was a new procedure and that there had not been much experience with it. [R. 83.] Information had to be gathered concerning how such a job as that sought to be undertaken could be done; difficulties had to be surmounted and time was needed to explore various possibilities. [R. 83-86.] He consulted Eastman Kodak Company, and they indicated that to do a job of this size they would have to make a special setup in Los Angeles. [R. 83-86.] After investigation, the decision to microfilm was finally made in the spring of 1943 and the contract signed with the Microstat Company in July 1943. [R. 71, 85-86.] The actual microfilming work started in September, 1943, and was completed in the fall of 1944. [R. 71.]

⁵It was not until February, 1944, that the United States Marines began to take the Marshall Islands and Kwjalein; thereafter came bloody engagements for Truk (February 1944); New Britain (April 1944); Hollandia (April 1944); Saipan (June 1944); Guam (July 1944); the Carolines (September 1944); Peleliu (November 1944); Iwo Jima (February 1945); and Okinawa (April 1945). It was not until October 19, 1944, that General Douglas MacArthur returned to conquer the Philippine Islands.

business expense” [R. 39] is a finding of fact which, as has been pointed out heretofore, is supported by substantial evidence. This is the ultimate fact essential to recovery of the taxes overpaid by appellee. *Botany Worsted Mills v. United States*, 278 U. S. 282 (1929); and *McGee v. Nee*, 113 F. 2d 543 (C. C. A. 8, 1940), where it was stated that:

“The ultimate fact essential to a recovery by the plaintiff under his complaint was that the deduction disallowed by the Commissioner was an ordinary and necessary business expense * * *” 113 F. 2d at 546.

Rule 52(a) of the Federal Rules of Civil Procedure provides in part that:

“* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *”

The extent of the 1944 Japanese “retreat” (as characterized by appellant) is manifest from the fact that the Philippine Islands were not declared liberated from Japanese rule until July, 1945; moreover, during the summer and fall of 1944, the Japanese offensive in the China-India-Burma theatre compelled United States Forces to abandon at least five major air fields (Hengyang, June 30, 1944; Kweilin, September 17, 1944; Kwangsi, October 1, 1944; Liuchow, November 13, 1944; and Nanning, November 26, 1944). Nor was the picture in Europe as rosy as appellant would now paint it. From January through May, 1944, the Allied Armies took a terrific beating at the Anzio Beachhead. During February and March, 1944, Allied Forces were being routed at Cassino. D-Day—the long awaited second front in Europe—did not begin until June 6, 1944, and it was August 15, 1944, before the Allies landed in Southern France. Although counsel for appellant may now, substantially more than ten years after the events, profess a unique *nunc pro tunc* clairvoyance, we respectfully submit that the responsible officials of Appellee acted with reasonable business judgment in the circumstances when they decided to microfilm their back newspapers to protect them from bombing. See *History of World War II* (Francis Trevelyan Miller—1945—Chronology of World War II, pp. 943-966).

The above rule has been applied by this Court in many cases. In the recent case of *Stockton Harbor Industrial Co. v. Commissioner*, 216 F. 2d 638 (1954), this Court, said in its opinion in part:

“* * * this court and other courts have held that it is not our function to retry questions of fact determined by the trial court upon conflicting evidence or even upon uncontradicted evidence where different inferences may reasonably be drawn from them. [Citing cases.]” (216 F. 2d at 640.)

See also:

Ellsworth M. Dunn v. Commissioner, 218 F. 2d
..... (C. C. A. 9), decided March 11, 1955;

Talache Mines v. United States, 218 F. 2d 491
(C. C. A. 9, 1954);

Brownell v. Lee Mon Hong, 217 F. 2d 143 (C. C.
A. 9, 1954);

Shew v. Dulles, 217 F. 2d 146 (C. C. A. 9, 1954);

United States v. Kintner, 216 F. 2d 418 (C. C. A.
9, 1954); and

Gamerwell Co. v. City of Phoenix, 216 F. 2d 928
(C. C. A. 9, 1954).

The Circuit Court of Appeals for the Sixth Circuit has recently held that the decision of the lower court, if supported by the facts in evidence, should not be reversed even though, if the matter were before the Appellate Court in a trial *de novo*, the decision might have gone the other way saying in part:

“* * * We are unable to say that the facts in this case do not support the Tax Court’s finding.
* * * Unless clearly erroneous, the finding is binding upon us. * * *”

Gotfredson v. Commissioner, 217 F. 2d 673, 677
(C. C. A. 6, 1954).

It is respectfully submitted that the decision of the District Court in the instant case is amply supported by the uncontradicted evidence of record; that the decision is not clearly erroneous; and that therefore the decision of the District Court should be affirmed.

Conclusion.

The Findings of Fact, Conclusions of Law and Judgment of the District Court are supported by substantial evidence; they are not clearly erroneous; the expenditures for microfilming constitute ordinary and necessary expenses incurred in carrying on appellee's newspaper business, in any event; and therefore the judgment should be affirmed.

Dated March 31, 1955.

Respectfully submitted,

MACKAY, MCGREGOR, REYNOLDS & BENNION,

By A. CALDER MACKAY,

ADAM Y. BENNION,

STAFFORD R. GRADY,

Counsel for Appellee.

No. 14584

United States
Court of Appeals
for the Ninth Circuit.

LOUIS GOLD, Doing Business as the GOLD
DESK AND SAFE COMPANY,

Appellant,

VS.

H. M. GERSON, Trustee in Bankruptcy of the
Estate of ROBERT STEINBERG, Doing
Business as PACIFIC LITHO-ART COM-
PANY, AMALGAMATED CREDITORS EX-
CHANGE and JERRY'S MARKET, Bank-
rupt,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division

FILED
FEB 15 1935
PAUL P. O'BRIEN,
CLERK

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United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Witnesses:

Gold, Louis

—direct 32

—cross 56

Steinberg, Robert B.

—direct 40

—cross 48

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

ALFRED LUBIN,
MARSHALL ABBOTT,
215 South La Cienega Blvd.,
Beverly Hills, Calif.

For Appellee:

CRAIG, WELLER & LAUGHARN,
111 West 7th St., Room 817,
Los Angeles 14, Calif.

In the District Court of the United States, Southern
District of California, Central Division

No. 59563-Y

In the Matter of:

ROBERT B. STEINBERG, Doing Business as
PACIFIC LITHO-ART COMPANY, AMAL-
GAMATED CREDITOR EXCHANGE and
JERRY'S MARKET,

Debtor.

IN PROCEEDINGS FOR AN ARRANGEMENT

To the Honorable Judges of the District Court of
the United States, for the Southern District
of California, Central Division

The petition of Robert B. Steinberg respectfully
represents:

I.

The Debtor has resided in the City of Los Angeles, County of Los Angeles, State of California, within the above judicial district, for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

II.

The Debtor is one who could become a bankrupt under Section 4 of the Bankruptcy Act, 11 U.S.C.A., Section 22.

III.

The nature of the business conducted by the Debtor is that of a public accountant. [2*]

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

IV.

No bankruptcy proceedings initiated by petition by or against your petitioner are now pending.

V.

Your petitioner is unable to pay his debts as they mature and proposes an arrangement for the payment of unsecured creditors under Chapter XI, Section 322 of the Bankruptcy Act, 11 U.S.C.A., Section 722, which is contained in Exhibit "A" annexed hereto and made a part hereof.

VI.

The Debtor will file Schedule "A" within ten days from the date hereof, as per Court order.

VII.

The Debtor will file Schedule "B" within ten days from the date hereof, as per Court order.

VIII.

The Debtor will file his Statement of Executory Contracts within ten days from the date hereof.

Wherefore, your petitioner prays that proceedings may be had upon this petition, in accordance with the provisions of Chapter XI of the Bankruptcy Act.

/s/ ROBERT B. STEINBERG,
Debtor.

QUITTNER AND STUTMAN,

By /s/ F. J. QUITTNER,
Attorneys for Petitioner. [3]

[Title of District Court and Cause.]

PROPOSED ARRANGEMENT

Robert B. Steinberg, the above-named Debtor, proposes the following arrangement with his unsecured creditors:

I.

Provisions Modifying or Altering the Rights of Unsecured Creditors

A. The unsecured debts of the Debtor are divided into the following classes:

1. Expenses of administration incurred herein which may be approved, allowed or ordered paid by the Court.

2. All debts which have priority under Section 64a (2), (4) and (5) of the Bankruptcy Act.

3. All unsecured claims.

B. The unsecured debts of the Debtor are treated as follows:

1. The Debtor proposes to pay the unsecured creditors in the following manner:

a. Administration expenses. [4]

The Debtor will pay the actual costs of administration of the Debtor estate as fixed by the Court, the necessary amounts to be expended for filing and indemnity fees and the respective attorneys for parties entitled to compensation out of this estate, as, if and when the same are allowed by the Court.

b. Labor claims.

All labor claims entitled to priority shall be paid as soon as moneys are available for that purpose, without awaiting formal confirmation of this plan of arrangement.

c. Tax claims.

The Debtor proposes to pay all tax claims in full as prior tax claims, in such manner and at such time as the various taxing agencies shall agree.

II.

Provisions for Modifying or Altering the Rights of Unsecured Creditors

The general unsecured claims of the Debtor shall be of one (1) class.

The Debtor proposes to settle and satisfy these claims by payment of 100% of the respective amounts of the said claims, without interest, as allowed in these proceedings, in the following manner, to wit:

The Receiver or other officer appointed by the Court is to liquidate all assets of the Debtor not exempt under the Bankruptcy Act forthwith, except sufficient accounting equipment which the Debtor requires in his accounting practice, and such other entities as, in the opinion of the creditors herein, can be operated profitably. From the proceeds thereof, the expenses of administration are to be paid and all claims entitled to priority under Section 64a of the Bankruptcy Act, and the [5] balance thereof shall thereafter be distributed to

all allowed general, unsecured claims. Any remaining deficiency is to be paid by the Debtor to all of his creditors at the rate of One Thousand Dollars (\$1,000.00) per month, commencing six (6) months after confirmation of this arrangement. Said One Thousand Dollars (\$1,000.00) is to be distributed pro rata to all of the said general, unsecured creditors by the Disbursing Agent appointed by this Court, at such times as the Court shall hereinafter direct. That the Debtor requires a period of six (6) months after confirmation to commence these payments in order to re-establish his accounting practice, as the only source of payment of the balance of creditors' claims is his own earnings. If the Debtor develops sufficient earnings, he will make every attempt to increase these payments of One Thousand Dollars (\$1,000.00) per month, as hereinabove set forth.

That during the period of extension, the said accounting practice of the Debtor will be operated by him on a businesslike basis and, if the creditors desire to appoint a Creditors' Committee, he will consult with the said Creditors' Committee at all times.

III.

It is contemplated that upon confirmation of this arrangement, the Court will continue to retain jurisdiction for all purposes until the arrangement has been fully carried out, as hereinabove set forth.

IV.

That upon completion of the entire arrangement and the satisfaction of all creditors, these proceedings shall thereupon terminate and the Debtor shall be entitled to manage his affairs. [6]

V.

General Information Regarding
The Debtor's Affairs

The Debtor is by profession a public accountant. His other interests consist generally of the following: He operates a collection agency known as Amalgamated Creditor Exchange at 1242 South La Cienega Avenue, Los Angeles 35, California. He is the sole owner of a printing company known as Pacific Litho-Art Company at 1252 South La Cienega Avenue, Los Angeles, California. He has a partnership real estate interest in the Hotel Paradise in Ontario, California, and a partnership interest in a nine-unit apartment building located at 935 Maple Avenue, Burbank, California. He also has a partnership interest in an accounting firm in El Centro, California, known as Marlowe & Marlowe. He also owns a grocery store known as Jerry's Market, located at 3435 Figueroa Street, Los Angeles, California.

Approximately one week ago, the Debtor executed deeds and chattel mortgages to one Harold B. Kirsch, one of his creditors, which were security transactions to secure the said Harold B. Kirsch.

That the property so conveyed consisted of his home, a deed to the equity in the nine-unit apartment, a chattel mortgage on the accounting and printing equipment and the equipment located in Jerry's Market. That said conveyances are unquestionably preferential and should be set aside through these proceedings and all of the realization therefrom should be shared pro rata by the creditors of your Debtor.

VI.

In order to aid the administration of this estate, the Debtor believes that it will be to the creditors' best interest and the interests of the Debtor that a Receiver be appointed at once to take such steps as may be necessary to preserve [7] the assets of this estate, including prompt restraining orders against Harold B. Kirsch, restraining him from selling or disposing of any of the assets which he has seized possession of or will attempt to seize possession of. In addition thereto, steps will be taken by the Receiver to protect the equity of this estate in the nine-unit apartment hereinabove described, as well as the interest and equity of the Debtor in the Hotel Paradise and other interests.

Dated at Los Angeles, California, this 27th day of January, 1954.

/s/ ROBERT B. STEINBERG.

Duly Verified.

[Endorsed]: Filed January 27, 1954. [8]

[Title of District Court and Cause.]

APPROVAL OF DEBTOR'S PETITION AND
ORDER OF REFERENCE UNDER SEC-
TION 322, CHAPTER XI, OF THE BANK-
RUPTCY ACT

At Los Angeles, in said District, on January 27, 1954, before the said Court the petition of Robert B. Steinberg, d/b/a Pacific Litho-Art Company, Amalgamated Creditor Exchange and Jerry's Market, that he desires to obtain relief under Section 322 of the Bankruptcy Act, and within the true intent and meaning of all the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said petition is hereby approved accordingly.

It is thereupon ordered that said matter be referred to David B. Head, Esq., one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Robert B. Steinberg, d/b/a Pacific Litho-Art Company, Amalgamated Creditor Exchange and Jerry's Market, shall attend before said referee on February 4, 1954, and at such times as said referee shall designate, at his office in Los Angeles, California, and shall submit to such orders as may be made by said referee or by this Court relating to said matter.

Witness, the Honorable Leon R. Yankwich, Judge

of said Court, and the seal thereof, at Los Angeles, in said District, on January 27, 1954.

EDMUND L. SMITH,
Clerk;

By /s/ ARTHUR P. STORES,
Deputy Clerk.

[Endorsed]: Filed January 27, 1954. [10]

[Title of District Court and Cause.]

ORDER OF ADJUDICATION

This matter coming on for hearing before the undersigned Referee on March 29, 1954, at the hour of two o'clock p.m., thereof as the first meeting of creditors in proceedings under Chapter XI of the Bankruptcy Act, as amended, and notice of said first meeting and of the hearing on application to confirm Plan, and objections thereto, if any, having been given, the matter having then been continued to April 19, 1954, at the hour of two o'clock p.m., thereof and at said time the debtor herein having failed to file his application for confirmation within the time fixed by the court, and the Referee being fully advised in the premises,

Now, Therefore,

It Is Ordered that the within debtor be, and the same hereby is adjudged a bankrupt.

It Is Further Ordered that bankruptcy be pro-

ceeded with pursuant to the provisions of the Bankruptcy Act.

Dated: April 21, 1954.

/s/ DAVID B. HEAD,
Referee in Bankruptcy.

[Endorsed]: Filed April 22, 1954. [11]

[Title of District Court and Cause.]

PETITION OF RECLAMATION

To the Honorable David B. Head, Referee in
Bankruptcy:

The Petition of Louis Gold, respectfully shows and alleges:

1. That your petitioner is now and for a long time last past has been engaged in the business of buying and selling office furniture, fixtures and equipment, under the fictitious firm name and style of Gold Desk & Safe Co., and has heretofore complied with Sections 2466 of the Civil Code of the State of California, with reference to the use of fictitious firm names.

2. That prior to the filing of the petition in Bankruptcy herein, the bankrupt was engaged in the business of rendering Public Accounting Services, with offices located at 1244 South La Cienega, in the city and county of Los Angeles, State of California.

3. That a petition in Bankruptcy was filed by the above-named bankrupt herein on the 27th day of January, 1954, and was duly adjudicated as such,

under the provision of Chapter 11, [12] of the Bankruptcy Act; that thereafter H. M. Gerson was duly appointed Trustee and duly qualified and is still acting as such.

4. That as such trustee, said H. M. Gerson took possession of the property of the estate of the bankrupt, including the property described in Schedule "A" hereto annexed.

5. That heretofore and on the days and dates set forth in the Schedule hereto attached, petitioner herein delivered to the bankrupt, at the special instance and request of said bankrupt, the goods described in said Schedule "A" hereto annexed.

6. That prior to the commencement of delivery of said goods, the petitioner and bankrupt entered into an agreement, that the goods described in Schedule "A" were to remain the absolute property of the petitioner; and that the bankrupt would pay to the petitioner the sum of \$100.00 per month as rental for the use of said goods; that your petitioner is entitled to immediate possession of same.

7. Upon information and belief that H. M. Gerson, Trustee, now is in possession of said goods, and although duly demanded, said H. M. Gerson, Trustee, herein, has neglected, failed and refused to return the aforesaid property.

Wherefore, Petitioner prays for an order directing said H. M. Gerson herein to deliver to Petitioner the said goods described in Schedule "A" annexed.

Dated: This 15th day of February, 1954.

/s/ LOUIS GOLD,
Petitioner. [13]

Schedule "A"

Invoice No. 3-7792 Date, 2-13-53.

Merchandise—9 #5260 Softone left pedestal typewriter desks.

Invoice No. 3-7792 Date, 2-13-53.

Merchandise—9 #620 Sturgis green on gray posture chairs.

Invoice No. 3-7837 Date, 2-14-53.

Merchandise—5 #31-L Caddy files, gray, with cover and lock, letter size.

Invoice No. 3-7836 Date, 2-14-53.

Merchandise—10 #30 Gregson side chairs, chartreuse and softone.

Invoice No. 3-7836 Date, 2-14-53.

Merchandise—6 #31 Gregson arm chairs, chartreuse and softone.

Invoice No. 3-7836 Date, 2-14-53.

Merchandise—1 Scerbo overhand B1. walnut desk.

Invoice No. 3-7836 Date, 2-14-53.

Merchandise—2 Tiffany green typewriter stands.

Invoice No. 3-7836 Date, 2-14-53.

Merchandise—1 Kennar #2600 sofa, brown, #2021½.

Invoice No. 3-7836 Date, 2-14-53.

Merchandise—1 Kenmar #2601 lounge chair, #2021½ brown.

Invoice No. 3-7836 Date, 2-14-53.

Merchandise—2 Springfield end tables, softone #422.

Invoice No. 3-7836 Date, 2-14-53.

Merchandise—1 Beelner & Thomas Couch, green fabric.

Invoice No. 3-7836 Date, 2-14-53.

Merchandise—1 Myrtle #196-DT softone conference table.

Invoice No. 3-7836 Date, 2-14-53.

Merchandise—1 Telephone stand, softone.

Invoice No. 3-7836 Date, 2-14-53.

Merchandise—1 Western leather judge's chair.

Invoice No. 3-7836 Date, 2-14-53.

Merchandise—1 Barcalo chair, brown.

Invoice No. 3-7836 Date, 2-14-53.

Merchandise—2 steelage #8A43-L four dr., legal files, gray, with lock.

Invoice No. 3-7836 Date, 2-14-53.

Merchandise—1 steelage #8A41-L four dr., letter file, gray, with lock.

Invoice No. 3-7836 Date, 2-14-53.

Merchandise—1 Sturgis posture chair, green versilan, gray 620.

Invoice No. 3-7836 Date, 2-14-53.

Merchandise—2 Softone telephone tables.

Invoice No. 3-7864 Date, 2-14-53.

Merchandise—2 Softone telephone tables.

Invoice No. 3-7913 Date, 2-16-53.

Merchandise—1 60" Softone table B/U.

Invoice No. 3-7913 Date, 2-16-53.

Merchandise—2 #131-L Hanger files
(w/cover legal.

Invoice No. 9-7914 Date, 2-16-53.

Merchandise—1 60" Myrtle 5261F softone
special desk finished interior, heavy top, lock-
ing device.

Invoice No. 3-8137 Date, 2-16-53.

Merchandise—1 Tiffany green "S" type
stand.

Invoice No. 3-8431 Date, 2-27-53.

Merchandise—1 Sturgis posture chair high
stool, green & gray.

Invoice No. A-934 Date, 6-10-53.

Merchandise—1 #4224 Keystone gray storage
cabinet.

Invoice No. 9406 Date, 4-14-53.

Merchandise—1 60x34 E. C. Softone table &
1 glass top for desk.

Invoice No. D-156 Date, 4-28-53.

Merchandise—2 Tiffany "S" type stand,
gray.

Invoice No. B-6613 Date, 12-14-53.

Merchandise—1 "S" Tiffany type stand,
gray.

At the time of each and every delivery, on the days and dates above mentioned, a receipt was signed by the recipient, a copy of which was left with the bankrupt, which among other things contained the following clause:

“The purchaser and/or lessee, agrees that title to [15] merchandise listed herewith, shall remain in Gold Desk & Safe Co., until entire purchase price has been paid and purchaser and/or lessee, agrees to permit removal of same, with or without process of law, if not paid for within time stipulated, and to pay any and all expenses for collection or removal of said merchandise including a reasonable attorney fee. It is further understood that any sums paid on account prior to any repossession of above listed merchandise shall be as and for liquidated damages. At the option of the seller, upon default of any single payment, the said seller may declare the entire balance due, and sue for the purchase price thereof. Time is of the essence of this agreement.

/s/ LOUIS GOLD,
Petitioner.

Duly Verified.

[Endorsed]: Filed February 19, 1954, [16] Referee.

[Title of District Court and Cause.]

MEMORANDUM BY REFEREE
(Petition in Reclamation by Gold)

The petitioner, Louis Gold, who does business under the name of Gold Desk and Safe Co., petitioned for the reclamation of certain office furniture then held by the receiver herein, and now held by him as trustee of the above-named estate.

Petitioner contends in his pleading that the furniture in question was delivered to the bankrupt pursuant to an agreement by which the petitioner retained title to the furniture and that the petitioner was to be paid the sum of \$100.00 a month for rental of said furniture.

The evidence does not present a clear picture. As to whether or not there was a clear understanding between the parties which constituted an agreement between them, has not been shown. The documentary evidence consists in part of several invoices or delivery sheets (petitioner's exhibit 1). Some of these invoices bear the signature of Robert B. Steinberg, the bankrupt. [17] At the bottom of the invoice appears the following printed matter:

“It is agreed that the purchaser shall pay \$.
on execution of this agreement and the sum of
\$. on each commencing

“The purchaser, and/or lessee, agrees that title to merchandise listed herewith, shall remain in Gold Desk & Safe Co., until entire purchase price

has been paid and purchaser and/or lessee, agrees to permit removal of same, with or without process of law, if not paid for within time stipulated, and to pay any and all expenses for collection or removal of said merchandise including a reasonable attorney fee. It is further understood that any sums paid on account prior to any repossession of above listed merchandise including a reasonable attorney fee. It is further understood that any sums paid on account prior to any repossession of above listed merchandise shall be as and for liquidated damages. At the option of the seller, upon default of any single payment, the said seller may declare the entire balance due, and sue for the purchase price thereof. Time is of the essence of this agreement."

None of the blank spaces in the above paragraph were filled in.

The bankrupt made three payments of \$100.00 each. These amounts were credited to an open account carried under the name of the bankrupt on petitioner's books (petitioner's exhibit 2).

From a factual standpoint it is impossible to make a finding that any agreement was entered into between petitioner and bankrupt by which title to the furniture was retained by the [18] petitioner. No verbal contract has been proven and the written material on the invoices does not constitute a contract.

There being no contract by which title was retained, the delivery of the property to the bankrupt

passed title to him, and that title now rests in the trustee.

Counsel for trustee may prepare, serve and file proposed findings, conclusions and an appropriate order in conformance with Local Rule 7a.

Dated this 7th day of June, 1954.

/s/ DAVID B. HEAD,
Referee in Bankruptcy.

[Endorsed]: Filed June 7, 1954. [19]

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER THEREON

This matter coming on for hearing before the undersigned Referee on the 26th day of February, 1954, at the hour of 10:00 o'clock a.m. thereof, upon a petition in reclamation filed in the within proceeding by one Louis Gold, d/b/a under the fictitious firm name and style of "Gold Desk and Safe Co.," wherein said Louis Gold sought to recover certain personal property in the possession of the trustee under and by virtue of an alleged title retaining contract, and notice of said hearing having been given and the said receiver appearing in person and being represented by his attorney, Nat Rosin, and the said petitioner Louis Gold appearing in person and being represented by his attorney, Marshall Abbott, and evidence having been introduced and the Referee having been fully advised

in the premises, does hereby make the following Findings of Fact, Conclusions of Law and Order thereon:

Findings of Fact

The Referee finds the following facts: [20]

I.

That the Receiver, H. M. Gerson, now trustee, has in his possession certain personal property which is the subject matter of the petition in reclamation herein.

II.

That Louis Gold is doing business under the fictitious firm name and style of Gold Desk and Safe Co.

III.

The transaction between the bankrupt and said Louis Gold is evidenced by certain documents, including invoices and delivery sheets.

IV.

Certain of the invoices bear the signature of Robert B. Steinberg.

V.

At the bottom of the said invoices appears the following printed matter:

“It is agreed that the purchaser shall pay \$..... on execution of this agreement and the sum of \$..... on each, commencing

“The purchaser, and/or lessee, agrees that title to merchandise listed herewith, shall remain in Gold Desk & Safe Co. until entire purchase price has

been paid and purchaser and/or lessee, agrees to permit removal of same, with or without process of law, if not paid for within time stipulated, and to pay any and all expenses for collection or removal of said merchandise including a reasonable attorney fee. It is further understood that any sums paid on account prior to any repossession of above-listed merchandise shall be as and for liquidated [21] damages. At the option of the seller, upon default of any single payment, the said seller may declare the entire balance due, and sue for the purchase price thereof. Time is of the essence of this agreement."

VI.

That none of the blank spaces in the above-printed matter was filled in.

VII.

That the bankrupt herein made three payments of \$100.00 each toward the purchasing of the personal property in question.

VIII.

That the payments made by said bankrupt were credited on the petitioner's books to an open account carried under the name of the bankrupt herein.

IX.

That there was no agreement between the petitioner and the bankrupt by which title to the personal property in question was to be retained by said petitioner.

X.

That no verbal contract to this end was made.

Conclusions of Law

The Referee concludes as a matter of law:

I.

That the written material on the invoices heretofore mentioned does not constitute a contract.

II.

That there is no contract in existence by which title was retained through the personal property in question by the petitioner.

III.

That when the personal property in question was delivered to the bankrupt, title did then pass to the bankrupt and now rests [22] in the trustee herein, H. M. Gerson.

Order *

It Is Ordered that the personal property subject to the petition in reclamation now under consideration, filed by said Louis Gold, be, and the same hereby is, declared and decreed to be free and clear assets of the within bankrupt estate and free of any right, title, lien and/or interest therein in favor of Louis Gold, d/b/a Gold Desk and Safe Co., by virtue of any alleged title retaining contract, or otherwise.

Dated: June 24, 1954.

/s/ DAVID B. HEAD,

Referee in Bankruptcy.

Received June 17, 1954.

[Endorsed]: Filed June 24, 1954, Referee. [23]

[Title of District Court and Cause.]

PETITION FOR REVIEW FROM ORDER OF
REFEREE DENYING PETITION FOR
RECLAMATION

Your Petitioner, Louis Gold, respectfully represents to the court that a Petition in Reclamation was filed in the above matter by your Petitioner, doing business under the fictitious firm name and style of "Gold Desk & Safe Company," wherein your Petitioner sought to recover certain personal property in the possession of the Trustee, under and by virtue of a title retaining agreement; that the matter came up for hearing before the Honorable David B. Head, Referee in Bankruptcy, on the 26th day of February, 1954; that Findings of Fact were presented to the said Referee and on the 24th day of June, 1954, the following order was entered by the said Referee:

Order

It Is Ordered that the personal property subject to the petition in reclamation now under consideration, filed by said Louis Gold, be, and the same hereby is, declared and decreed to be free and clear assets of the within bankrupt estate and free of any right, title, lien and/or interest therein in favor of [24] Louis Gold, d/b/a Gold Desk and Safe Co., by virtue of any alleged title retaining contract, or otherwise.

Dated: June 24, 1954.

DAVID B. HEAD,
Referee in Bankruptcy.

Your Petitioner further represents and respectfully submits that certain errors were committed by the said Referee in respect to the entry of said order and that said errors are as follows:

1. That the Referee erred in not finding that your Petitioner and the bankrupt entered into a verbal agreement wherein title to the personal property sold and delivered to the bankrupt by your Petitioner was retained in the seller.

2. That the Referee erred in not finding that the execution of the numerous invoices introduced in evidence by the bankrupt constituted an agreement wherein title to the personal property sold would remain in the seller.

3. That the Referee erred in finding that there was no contract in existence by which title was retained through the personal property in question by your Petitioner.

4. That the Referee erred in finding that the title to the personal property in question passed to the bankrupt and now rests in the Trustee.

In support of the foregoing errors alleged to have been committed by the Referee, your Petitioner respectfully submits the following contentions:

(a) There is no evidence in the record that there was any intention on the part of the parties that title to the merchandise should pass to the bankrupt.

(b) The invoices did not contain any specific price and it is uncontradicted that the price was

to be ascertained at a later date and that the Bankrupt was to make payments on account [25] at the rate of \$100.00 per month, which was to be a rental until such price was ascertained. This, together with the signed invoices, clearly discloses that this was an executory contract with a reservation of title until the formal contract and the ascertainment of price shall have been agreed by the parties.

(c) In a contract to sell specific goods, title does not pass to the buyer until such time as the parties to the contract intend it to be transferred.

(d) A rental or lease agreement with a reservation of title, or any agreement where the title is to remain in the seller until the total purchase price is paid is a conditional sales agreement.

(e) The right of possession or title to property may be reserved by the parties notwithstanding the delivery of the goods to the buyer.

Wherefore, your Petitioner prays that the findings and the order of the Honorable David B. Head may be reviewed and that a judgment be entered in accordance with the prayers of the reclamation petition heretofore filed by your Petitioner.

/s/ LOUIS GOLD,
Petitioner.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 3, 1954, Referee. [26]

[Title of District Court and Cause.]

MINUTES OF THE COURT—SEPT. 13, 1954

Proceedings: For hearing petition for review of Referee's order denying Petition of L. Gold to recover furniture and fixtures.

Attorney Lubin argues to the Court.

Court adopts findings of referee and orders that the Order of the referee is affirmed; Attorney Bartley to prepare formal order.

EDMUND L. SMITH,
Clerk;

By /s/ JOHN A. CHILDRESS,
Deputy Clerk. [45]

In the United States District Court for the Southern District of California, Central Division

In Bankruptcy No. 59,563-Y

In the Matter of:

ROBERT B. STEINBERG,

Bankrupt.

ORDER RE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER THEREON

This matter coming on regularly for hearing before the undersigned Judge of the United States District Court for the Southern District of California, Central Division, on the 13th day of September, 1954, at 10:00 o'clock a.m. thereof upon

the Petition for Review brought by Louis Gold, and the petitioner appearing by and through his counsel, Marshall Abbott and Alfred Lubin, by Alfred Lubin, and the respondent appearing by and through his counsel, Craig, Weller & Laugharn, by William E. Bartley of counsel, and the matter having been argued by respective counsel, and the court being fully advised in the premises;

This court hereby adopts and approves the Findings of Fact, Conclusions of Law and Order of the Honorable David B. Head, Referee in Bankruptcy, and

It Is Hereby Ordered that the order of the Honorable David B. Head, Referee in Bankruptcy, dated June 24, 1954, is hereby affirmed.

Dated: September 15th, 1954.

/s/ LEON R. YANKWICH,

United States District Judge.

[Endorsed]: Filed September 15, 1954. [46]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Please take notice that the petitioner, Louis Gold, doing business as the Gold Desk & Safe Company, appeals to the United States Court of Appeals, Ninth District from the order of Court entered September 15, 1954, approving the findings of fact and conclusions of law of the Honorable David B. Head, Referee in Bankruptcy, and from the judgment confirming the order of the Honorable

David B. Head, Referee in Bankruptcy, dated June 24, 1954.

Dated October 11, 1954.

ALFRED LUBIN &
MARSHALL ABBOTT,

By /s/ ALFRED LUBIN,
Attorneys for Petitioner.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 13, 1954, [47]
U.S.D.C.

In the District Court of the United States, South-
ern District of California, Central Division
In Bankruptcy No. 59,563-Y

Before: Honorable David B. Head,
Referee in Bankruptcy.

In the Matter of:

ROBERT B. STEINBERG,

Bankrupt.

REPORTER'S TRANSCRIPT OF PROCEED-
INGS OF HEARING RE PETITION IN
RECLAMATION

Appearances:

H. M. GERSON, ESQ.,
Receiver.

NAT ROSIN, ESQ.,
For the Receiver.

MARSHALL ABBOTT, ESQ., by
ALFRED LUBIN, ESQ.,
For Petitioner, Louis Gold.

February 26, 1954

The Referee: In the Robert Steinberg matter we have a hearing re petition in reclamation.

Mr. Rosin: That's right, your Honor.

The Referee: I read it when it was filed.

Mr. Rosin: On behalf of the receiver, we would like to move to dismiss the petition on the ground it sets up a rental basis but exhibits a contract purchase basis, and fails to set up the original price or the balance due and, you might say, disallows any possible equity on behalf of the receiver, besides any other relief, which I was going to ask the Court for this morning.

Mr. Lubin: If the Court please, the whole transaction, as will be brought out by Mr. Gold, is on a rental basis with option to purchase. The office furniture was delivered to the bankrupt on that basis, and I believe that is all we have to do; we have alleged that. We have not alleged any conditional sales transaction. It is purely a rental thing. The clause in each of the invoices, "The purchaser, and/or lessee, agrees that title to merchandise listed herewith, shall remain in Gold Desk & Safe Co. until entire purchase price has been paid," that is and/or; and he agrees to permit to having the whole thing removed. I believe Mr. Gold can tell you what the transaction is. [2*]

The Referee: The transaction is in this contract, isn't it? It has been reduced to writing.

Mr. Lubin: The entire transaction is not in the

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

contract. There is no contract; that is, no contract except verbal, and it was agreed the title should remain in Gold.

The Referee: Well, in the receipts it says:

“The purchaser, and/or lessee, agrees that title to merchandise listed herewith, shall remain in Gold Desk & Safe Co. until entire purchase price has been paid and purchaser and/or lessee, agrees to permit removal of same, with or without process of law, if not paid for within time stipulated, and to pay any and all expenses for collection or removal of said merchandise including a reasonable attorney fee. It is further understood that any sums paid on account prior to any repossession of above-listed merchandise shall be as and for liquidated damages. At the option of the seller, upon default of any single payment, the said seller may declare the entire balance due, and sue for the purchase price thereof. Time is of the essence of this agreement.”

Is there something else besides what is there?

Mr. Lubin: Yes, sir. The deal is simply this——

The Referee: Let's take the testimony. [3]

Mr. Lubin: Yes, let's take the testimony of Mr. Gold, and if your Honor feels there is not enough alleged in the petition, we will protect the receiver——

The Referee: Let's take the testimony first.

Mr. Lubin: Mr. Gold, take the stand, please.

LOUIS GOLD

having been first duly sworn, testified on oath as follows:

By Mr. Lubin:

Q. Your name is Louis Gold? A. Yes, sir.

Q. And what is your business, Mr. Gold?

A. Office furniture business; buying and selling and rental of office furniture.

Q. Where is your business?

A. 345 East Third Street, Los Angeles.

Q. And you are the proprietor of the Gold Desk and Safe Company? A. I am.

Q. Do you know Mr. Robert Steinberg, the bankrupt in this case? A. I do.

Q. Did you have any transaction with him in connection with some office furniture?

A. On July 23rd I went to his office——

Q. July or January?

A. January 23, 1953. I went to his office and consummated [4] a deal with him for renting of new furniture for his new place of business.

Q. Just tell us about the deal.

A. He had some old furniture which we took in trade, which, after the rental was consummated, would apply on the payment of the furniture if we made a deal, or completed the deal.

Q. What kind of a deal did you make with him?

A. He agreed to pay \$100 a month until the entire purchase price of the furniture was paid, which was to be determined at the time we completed his office.

(Testimony of Louis Gold.)

Q. On January 23rd was there any purchase price set up?

A. There was no definite purchase price set up, just a tentative price; how much this desk would be and so forth.

Q. (By the Referee): What was the approximate amount?

A. We never arrived at an exact amount.

Q. Well, an approximate amount?

A. About \$4,000 worth of furniture.

Q. How much has been paid on it?

A. Three monthly payments of \$100 a month.

Q. Then you got \$300?

A. Yes, sir. They were to be paid monthly and he missed the first month.

Q. Well, you must have arrived at a figure then?

A. Approximately \$500. [5]

Q. Well, you must have arrived at a figure then?

A. We didn't arrive at a definite figure because the prices were changed. For instance, he got a fancy executive desk for the new business and we didn't decide that would be the proper desk to stay in that place when we sent it out and as soon as he didn't make his first monthly payment I realized that was probably too much to ever get out of the deal.

Q. (By Mr. Lubin): Mr. Gold, I have here a series of memorandums, consisting of eleven sheets. Were these the memorandums or receipts of the merchandise, evidencing the furniture that was sold to Mr. Steinberg?

A. These are the delivery receipts showing what we delivered to Mr. Steinberg.

Q. Was this the office furniture actually, which is mentioned in those delivery sheets, which was in fact delivered to Mr. Steinberg?

A. They were, and some of them are personally signed by Mr. Steinberg.

Q. And on the date they bear?

A. Yes; the date is right at the top, the date of delivery.

Mr. Lubin: I will offer these receipts in evidence.

The Referee: They will be marked Petitioner's "1." [6]

Q. (By Mr. Lubin): What rental payments have you received?

A. He paid three \$100 checks.

Q. And is that the only rental payment you have received on this furniture?

A. That is the only payments we received on the furniture.

Mr. Rosin: Do you have the dates?

Mr. Lubin: Yes. July 5, \$100; pardon me, that is 1952. March 30, \$100; May 1st, \$100; June 17, \$100. The other one was on an old account.

Q. Those three, is that correct; those payments?

A. That's correct.

Q. And I believe you said this furniture, at the time of the delivery, was worth about \$4,000; is that correct?

A. That is correct; \$4,000.

Q. Mr. Gold, in the event the trustee or anyone

(Testimony of Louis Gold.)

under Mr. Steinberg wishes to take over this furniture you would still allow them to——

A. I would still allow anyone who wanted to take over the furniture the \$300 rental paid and the \$500 value of the old furniture, to apply on the purchase of said furniture.

Mr. Lubin: I have nothing further.

The Referee: Well, gentlemen, it is clear that what you have here—you may step down. What is your full name? [7]

The Witness: Louis Gold.

(Witness leaves stand.)

The Referee: What you have here is an executory contract, under Section 70-B of the Bankruptcy Act. The trustee would have a minimum period of sixty days from the date of adjudication—I believe they have changed that now to the date of the first meeting——

Mr. Lubin: When did you have your first meeting?

The Referee: It hasn't been set yet.

Mr. Rosin: No; the schedules were just filed the other day. We have this problem, as your Honor knows, until the schedules are filed we have no way of knowing the situation in a lot of these things.

The Referee: Well, sixty days. But even if the Court shortened the period—I will direct Mr. Gerson to have this furniture appraised and see whether he has any equity. Of course, if he has no equity——

Mr. Rosin: Well, I haven't gone into the legal

phase of this yet. We would not deny the vendor any rights he has as long as we know what our rights are.

The Referee: You are dealing with an executory contract here and you should be able to decide whether you want to take it over or not. If you reject the contract then you will have to give the furniture back.

Mr. Rosin: Your Honor is not making a decision, [8] is he?

The Referee: No. But I am telling you you will have to act in a reasonable time.

Mr. Rosin: In the light of Mr. Gold's testimony this morning, I would suggest that the matter go over a reasonable length of time, to enable us to know what we are going to do; and, second, this is not even a bankruptcy; it is just a debtor proceeding.

Mr. Lubin: May I ask what is being done with this furniture at the present time? Is it being taken care of so it will not be damaged or lost?

The Referee: I think Mr. Gerson has it locked up.

Mr. Gerson: I showed it yesterday to one of the appraisers and some of it was foreign to him. A lot of the items we found there but some of the items were not known to him. That is a matter of running it down.

The Referee: Didn't he have an appraisal there, or something?

Mr. Gerson: That is the curse of the thing. We are now having a problem of accounting.

The Referee: Some of it may be money, this curse stuff.

Mr. Lubin: Did he have a partner? I don't know anything about it.

The Referee: None of us know anything about it. He is in here with six or seven businesses. We have a hotel, a food market, and an accounting business and—what else?

Mr. Gerson: A printing shop. [9]

The Referee: Yes; and a printing shop.

Mr. Rosin: I also think there are some oil interests showing up. I am not telling you that for a fact, but I think so. I think that would be the best way to handle this. Mr. Abbott called me and said he would like to put this on as early as possible and I wanted to accommodate him but I don't like to be forced——

The Referee: Oh, I won't force you to do anything overnight.

Mr. Lubin: If your Honor wants to give Mr. Rosin an opportunity to check into this thing thoroughly I have no objection as long as the equipment is being taken care of. I would like to have the trustee check to find out how much the bankrupt has in his possession at the present time.

The Referee: Maybe you should make some arrangement for Mr. Gold to go out there.

Mr. Lubin: Yes, sir. Would you make any objection to permitting Mr. Gold to contact Mr. Gerson and go there and find what is there; and if Mr. Kirsch has some of it we can proceed against Mr. Kirsch?

Mr. Rosin: I don't think it will be as easy as that.

Mr. Lubin: Mr. Gold says he saw most of the stuff there.

The Referee: I am pretty sure Mr. Gerson hasn't moved anything.

Mr. Rosin: I talked to Mr. Stutman the other day, and frankly there is a question in my mind as to whether title [10] did or did not pass and I want an opportunity to look into that, without prejudice to Mr. Gold's position.

The Referee: Let's put this over to March 11th at 10:00 o'clock.

Mr. Lubin: Your Honor, I am in trial in Long Beach.

The Referee: How long will that take?

Mr. Lubin: Until at least March 15th, or the 14th.

The Referee: How about March 18th?

Mr. Lubin: How about March 17th?

The Referee: All right. Let's make it March 17th, but we may not have to do anything at that time. We may have this all straightened out before then.

Mr. Rosin: At 10:00 o'clock?

The Referee: Yes, 10:00 o'clock. Do you have any need for these invoices in the meantime?

Mr. Lubin: No; I have offered them in the case.

The Referee: All right. They will be received in evidence.

(Court adjourned.) [11]

Wednesday, March 17, 1954—10:00 A.M.

The Referee: Let us take up the Steinberg matter now.

Mr. Rosin: Your Honor will recall that this was a petition for reclamation and it came up previously, at which time Mr. Gold testified. There was no cross-examination, but at that time I made a motion for dismissal of the petition on the ground that their allegations were insufficient. The matter did not set forth the basis of a petition for reclamation. There were no contracts attached and no basis for title retaining. I think your Honor made a statement to the effect that there appeared to be some executory contract possibility here. Then the matter was put over, because the receiver wanted more time to go into this matter.

Now, since that time we have gone into the matter. We have Mr. Steinberg here. It appears that there is a general denial in every respect to the petition for reclamation. There is the statement made which would be supported by testimony that there never was a conditional sales contract nor a leasing arrangement nor any other kind of arrangement other than an outright sale.

This is the position of the receiver. I did not notify Mr. Lubin until this morning; he is entitled to [12] have Mr. Gold here. I have Mr. Steinberg.

Mr. Lubin: As long as Mr. Steinberg is here, let's have his testimony. Perhaps I will rest on his testimony. After all, Mr. Gold has already testified and there has been certain documentary evidence introduced.

Mr. Rosin: I will put on Mr. Gold for cross-examination, but that is something we can do later on.

The Referee: Let's take Mr. Steinberg's testimony.

Mr. Rosin: Will you take the stand, Mr. Steinberg? Does your Honor have the original exhibits?

The Referee: I will get them.

ROBERT B. STEINBERG

having been duly sworn, appearing as a witness on behalf of the receiver, was examined and testified as follows:

Examination

By Mr. Rosin:

Q. Mr. Steinberg, you are the debtor in these proceedings? A. That is right.

Q. Do you know the Gold Desk and Safe Company? A. Yes, I do.

Q. And particularly Mr. Louis Gold?

A. I do.

Q. Have you had business transactions with the gentleman? A. Yes, sir. [13]

Q. Over what period of time was that?

A. From 1949 to through 1953.

Q. Now, do you recall purchasing furniture or entering into a furniture transaction commencing some time in April, 1953—I beg your pardon. Let's set a better time—somewhere in the early part of 1953?

A. That is right. It was in January, 1953.

Mr. Lubin: January; yes.

(Testimony of Robert B. Steinberg.)

Q. (By Mr. Rosin): Prior to that time, had you purchased any furniture from Mr. Gold—

A. I had.

Q. —or the Gold Desk and Safe Company?

A. I had.

Q. On how many particular occasions had you purchased furniture from the Gold Desk and Safe Company? A. Prior to January?

Q. Yes.

A. I would say it was on three or four occasions.

Q. Going back to 1949? A. That is right.

Q. On each particular occasion, what were the arrangements?

Mr. Lubin: I am going to object on the ground that it is incompetent and immaterial. That has no bearing on this case, what the arrangement was before in 1949.

The Referee: The objection is good. It will [14] be sustained.

Mr. Rosin: May it be reserved until later when it becomes material?

The Referee: Yes; if you can show materiality.

Q. (By Mr. Rosin): In the early part of 1953, you entered into a transaction involving the purchase or obtaining of certain equipment from the Gold Desk and Safe Company?

A. That is right.

Q. Now, tell us the transaction from its inception. Did you meet with Mr. Gold? A. I did.

Q. Where did it take place?

(Testimony of Robert B. Steinberg.)

A. In my office.

Q. Was anybody else present?

A. Well, right in my office. It was in my private office. Actually, my first meeting with Mr. Gold was on his premises.

Q. When was that? Try and fix the date.

A. It was at the outset of 1953, in January. I came down to his place on East Second Street, I believe it was, and his salesman, a Mr. Chasen—I am not quite certain of the name—showed me different furniture, and we had arranged to meet at the office where I was making my arrangements to move over to on La Cienega. I had still been using the premises on Wilshire Boulevard. But he later called me, I believe, just prior to our arranged meeting [15] and told me he had discussed this with Mr. Gold and Mr. Gold himself wanted to meet me and handle the transaction personally, so Mr. Gold then came up to my office on Wilshire Boulevard and we went over the furniture that I had selected while I was down there, and he gave me the prices of the furniture.

Q. Now, stop right there. This took place at your office on Wilshire Boulevard?

A. That is right.

Q. Was there a list of furniture at that time in existence?

A. No. What had happened was when I went down to Gold's originally, I had selected various items of furniture and the salesman had, if I believe correctly, made a list of it.

(Testimony of Robert B. Steinberg.)

Q. That was what Mr. Gold brought out with him, or did you have it already?

A. I don't recall whether Mr. Gold brought it out with him or whether I had it. I know there was a specified list of furniture that had been selected.

Q. What further took place in this conversation?

A. Well, then, he gave me the prices which were other than the prices that had originally been quoted by his salesman. In fact, the prices were less, and he also quoted various trade-in allowances on the furniture that I had in the premises, which were five desks and one table, [16] various chairs, armchair, side chairs and some other auxiliary equipment.

Q. That was equipment which you had in your office at the time? A. That is right.

Q. Then the arrangement was to take this furniture? A. As a trade-in allowance.

Q. Was there any amount stated at that time?

A. Yes.

Q. It was agreeable?

A. Yes. We agreed. I believe the difference that existed was somewhere between \$2,200.00 to \$2,300.00. It was twenty-two hundred and some odd dollars without the sales tax applied.

Q. Now, what was the gross amount of the new furniture that was being obtained; the price?

A. A little over \$3,000.00.

Q. Do you know what amount had been discussed as the trade-in or sales allowance for your furniture?

(Testimony of Robert B. Steinberg.)

A. If I recall, the amount came in the neighborhood of \$800.00 or close to \$800.00 as an allowance for the furniture.

Q. You knew there was a net of about \$2,300.00?

A. That is right. In fact, Mr. Gold told me—he says, “I will send in the furniture,” and I asked him for an invoice and he told me, well, he will prepare the invoice [17] later; in the meantime, he is sending it in.

Also, I had selected a couch and a club chair, a particular couch and club chair, and he sent me something else. He told me that this was cheaper because it was made of plastic; it was just as nice and usable and cost me less. I asked him to quote me the price. He said, “I won’t bother quoting. When I come in to make out the invoice, I will adjust it. I won’t mislead you or take advantage of you.”

Q. That was two pieces of furniture?

A. That is right.

Q. What were they originally slated to be; what type?

A. They were supposed to have been a green, light green couch and light green club chair. Instead, he sent in a brown plastic couch and a brown plastic club chair.

Q. Were the first pieces supposed to have different material other than plastic?

A. That is right. It was leather.

Q. Leather, and what you received was plastic?

A. Yes.

(Testimony of Robert B. Steinberg.)

Q. Do you have any idea of the difference in value?

A. No; I have no idea. He told me it would be a lot less.

Q. At this original discussion you just referred to in your office, were there any statements made by Mr. Gold as to whether or not this would be on a leasing arrangement [18] or a conditional sales contract?

A. None whatsoever. The only agreement that he made with me was that he would let me pay it out directly to him at the rate of \$100.00 a month; in fact, he told me he is not putting it through any banks or charging me any interest on it, anything like that; that I shouldn't fail to pay him \$100.00 a month.

Q. Did you make some payments?

A. I made three payments and at each time I made the payments, I insisted that he send me the invoices and he claimed he was too busy. On one or two occasions he was on his way to New York. His accountant promised me faithfully it would be prepared and in the meantime he told me, "Just send in the \$100.00 on account. You know that your \$100.00, that the amount is in excess of what you are sending in, so you don't have to be afraid to send in \$100.00."

Q. Were these checks marked in any way?

A. I believe they were marked "on account." I can't say for certain.

Q. At the last hearing when you were not pres-

(Testimony of Robert B. Steinberg.)

ent Mr. Gold testified that on March 30, 1953, \$100.00 was paid by you; on May 1, 1953, \$100.00 was paid by you, and on June 17, 1953, \$100.00 was paid by you? A. That is correct.

Q. Is that about the payments, do you [19] think?

A. Yes; that is correct. And I stopped making payments since then, because I insisted——

Mr. Lubin: I object to what his conclusions are.

The Referee: You needn't go any further.

Q. (By Mr. Rosin): Now, Mr. Steinberg, you had some people working for you during the time in 1953? A. Yes.

Q. Who was G. Finkel?

A. That was the girl who worked for me as bookkeeper.

Q. Who was Elias? A. Sara, clerk-typist.

Q. D. E. Lee? A. Landlord.

Q. Of the premises? A. That is right, sir.

Q. Did any one of these parties have any authority from you to enter into any contract arrangement on your behalf? A. No, sir.

Q. There has been introduced—I believe your Honor has the exhibits.

The Referee: I do have.

Mr. Rosin: There has been introduced—I believe it is the petitioner's exhibit—invoices, or I guess they are called shipping statements.

Mr. Lubin: They are agreements. [20]

The Referee: Invoices.

(Testimony of Robert B. Steinberg.)

Mr. Lubin: And invoices. They are invoices and agreements.

The Referee: Look at it.

Mr. Rosin: I am just trying to identify it.

Q. I will now show you Petitioner's Exhibit One, which is a group of invoices here. Do you notice that there are signatures on each one of them, most of which are "Robert Steinberg"?

At any time when you signed any of these documents, was there any discussion by you with Mr. Gold regarding the signature?

Mr. Lubin: I object to that, because it attempts to alter or vary the terms of a written agreement.

The Referee: I will overrule your objection.

Q. (By Mr. Rosin): On what particular occasions do you recall a discussion with Mr. Gold?

A. Well, at one time—this furniture came in at different times. Not all of the furniture was shipped at one time. Upon the first receipt of shipment of the furniture, I asked Mr. Gold how come there was no price entered in it. It was at that time he told me we have to sit down and just go over the exact invoices and so forth, but in the meantime that this was just a receipt of—an acknowledgment of receipt.

Q. Can you fix a date? Look through those invoices [21] and see if you can determine the date. I think each invoice has a date. See if you can determine the date of this conversation which you say took place.

A. I recall moving into the premises on Satur-

(Testimony of Robert B. Steinberg.)

day, and most of the furniture had come in on a Saturday and as close as I can recollect, I believe it was the Monday following that Saturday that I had spoken to Mr. Gold, and at that time this particular conversation was brought up.

Q. This conversation, did it take place between the two of you in the actual presence of each other?

A. No; over the telephone.

Q. Who had made the original call?

A. I believe that I called Mr. Gold. It was in reference to some of the furniture and questioning—oh, yes, I called him because of the couch and chair that was sent in; the couch.

Q. The ones you had were a different material than what you ordered? A. Yes.

Q. Do you know what number you called; what place you called?

A. I called—it was a Michigan number. I don't recall.

Q. Was there any doubt in your mind whom you were talking to? A. Oh, no. [22]

Q. Did he identify himself? A. Yes.

Q. He said the person was Mr. Gold?

A. Oh, yes.

Mr. Rosin: You may cross-examine.

Examination

By Mr. Lubin:

Q. Mr. Steinberg, at the time that you first spoke with Mr. Gold about the purchase of this furniture, you did not have all of the cash to pay

(Testimony of Robert B. Steinberg.)

for it at that time? A. That is right, sir.

Q. You were moving into these premises on Lot 2, 1244 South La Cienega? A. That is right.

Q. You approached Mr. Gold with the idea of getting new furniture in your new premises, having him take your old and give you an allowance?

A. That is right.

Q. At that time you had a discussion that you were going to pay him at the rate of \$100.00 a month? A. That is right.

Q. At that time, there were certain furniture which was delivered to you from time to time; is that correct?

A. Well, the bulk of the furniture; all of the furniture that was in discussion at that particular time was shipped in within the week or so of the time I had [23] moved.

Q. Yes. Now, this exhibit, which is Petitioner's Exhibit No. One—for instance, I am referring to the second sheet bearing date of February 14, 1953, there are a number of items—was this signed; does your signature appear on that document?

A. That is right; it does.

Q. Does it appear where it has a line and says "Buyer"? A. That is right.

Q. Does it also appear at another line which says, "Above goods received in good order. Signed Robert Steinberg"? A. That is right.

Q. In other words, your signature appears twice?

A. That is right.

Q. You had examined this before you signed it?

(Testimony of Robert B. Steinberg.)

A. I examined the contents of the number of items shipped in accordance to what was actually stated.

Q. It was shown to you? A. Yes.

Q. You had an opportunity to examine it?

A. Yes.

Q. With respect to the delivery of this merchandise in this exhibit—we are just talking about the line—thereafter did you sign it?

A. Right at the completion of the [24] delivery.

Q. Which was on or about February 14, 1953?

A. That is right.

Q. I am referring to the next sheet, February 14, 1953, which refers to five caddy files. Does your signature appear in both places, both as buyer and as to receipt of the goods? A. That is right.

Q. I see. Was that signed by you at or about the time you received the merchandise?

A. That is right.

Q. Does your signature appear on this document? A. This is not my signature.

Q. That is not your signature? Do you know whose signature it is?

A. I believe that is the party.

Q. G. Finkel?

A. Yes. Gertrude Finkel. She was my book-keeper. This was dated after the other, February 14th. This was dated February 15th.

Mr. Rosin: 16th, isn't it?

(Testimony of Robert B. Steinberg.)

Mr. Lubin: 16th, yes; and also signed by Miss Finkel. Whose signature appears here?

A. That is mine.

Q. That is your signature. That is dated February 27, 1953. That is a posture chair, high-stooled chair.

Now, you just testified with respect to your [25] conversation with Mr. Gold here. You said you wanted to buy some furniture and you didn't have the entire cash to pay for all of it and he says that, "Well, if you will pay the rest at \$100.00 a month, I am not going to put it through financing and you won't be charged any interest. There will be no banks involved." A. That is right.

Q. At the time of the delivery, was there a definite price mentioned for each item?

A. At delivery?

Q. At the delivery. A. No, sir.

Q. The prices were the prices which were mentioned at the time you saw Mr. Gold; of each item?

A. That is right, sir.

Q. At the delivery, you say, there were no prices?

A. No; no prices.

Q. You received no bill for it?

A. I have never received any invoices.

Q. Did Mr. Gold tell you that after you paid up a few hundred dollars, a few payments, you would get together and determine what the price was?

A. No, sir. What Mr. Gold said was he will get together just as soon as he can. He was very busy.

(Testimony of Robert B. Steinberg.)

On one or two occasions, he was rushed. He had to go to New York or someplace in the East, and he couldn't make it. [26] In fact, at one time we were just about ready to make a particular appointment to meet; and, in any event, Mr. Gold always claimed he was too busy to meet with me.

Q. He told you as soon as he got a little time he would get together with you; is that right?

A. That is right.

Q. That was getting together in determining the exact amount of the merchandise——

A. That is right.

Q. ——the amount of your trade-in allowance and preparing the necessary papers; is that correct?

A. That is right. There was some adjustments to be made inasmuch as he did ship in a couch and a club chair that was other than what had been ordered. In the meantime, he said, "Well, send \$100.00 in. You owe in excess of that anyway, so let that apply on account."

Q. What items did he take in on trade?

A. Well, I don't know all of them. I know there was a large executive desk, a swivel arm chair with a side chair, matching side chair. There was one, two, three——

Q. Well, let me ask you——

A. There were five other desks and one table.

Q. Did he give you a certain set price that would be allowed for those items? A. Yes.

Q. What was that price? [27]

(Testimony of Robert B. Steinberg.)

A. Well, I don't recall exactly now, but as we went down item for item we went through the office and he checked over each piece of equipment or furniture that was being turned in and he made an allowance on each piece of furniture.

Q. You don't know what that is at the present time?

A. At the present time I wouldn't know. I do recall that the difference between the amount that was quoted by him for his furniture and the net difference after my trade-in allowance was applied was somewhere between \$2,200.00 to \$2,300.00.

Q. Is that just your independent recollection, or have you refreshed your memory by the examination of any memorandum or document?

A. It is my independent recollection.

Q. What was the price of that large desk; do you know?

A. The one I traded in or he had sent?

Q. One he sent to you.

A. I believe the large desk, he wanted four hundred and some odd dollars for it, \$450.00.

Q. When that was delivered, you noted on the invoice there was no price mentioned?

A. Right.

Mr. Lubin: I have no further questions of this witness.

The Referee: You may step down, Mr. Steinberg.

Mr. Rosin: We have additional evidence we wanted to go into. I have some questions to ask Mr.

Gold on [28] cross-examination, and we will make an effort to find these three checks and introduce them, your Honor. This morning was the first time we were told that they had the case on.

Mr. Lubin: I will admit there were certain three checks.

Mr. Rosin: The statement by Mr. Steinberg was that on its face it had the statement "on account," which I think there is some materiality. At least, I would like to verify the statement of Mr. Steinberg.

Mr. Lubin: I am willing to rest on the testimony as it stands right now. I submit, if the Court please, even according to Mr. Steinberg's testimony——

Mr. Rosin: I am not through. Unless the Court directs me otherwise, I want some cross-examination.

The Referee: If you want to cross-examine Mr. Gold, Mr. Gold is on his way here.

Mr. Lubin: He is not on his way here. I can't get him.

The Referee: When can you get him in; do you know?

Mr. Lubin: Any time. Any time that I have an open date. I cannot make it this afternoon. I can make it tomorrow or Friday anytime or next week some time, anything that suits your convenience.

Mr. Rosin: Tomorrow is all right, if your Honor's calendar will take it.

The Referee: We have a full calendar. [29]

Mr. Rosin: The early part of the week. We can

consider it at 3:00 o'clock of some afternoon. It shouldn't take more than half an hour.

The Referee: I put a matter over yesterday for Friday. Let's see what that was.

Do you want it at 11:30 Friday?

Mr. Rosin: It is all right.

Mr. Lubin: 11:30 Friday is all right. It may take 30, 35 or 40 minutes. It can't be over that length of time.

Mr. Rosin: I have only half a dozen questions on cross-examination, maybe a dozen.

The Referee: We will make it for 11:30 Friday.

(Whereupon the hearing was concluded.) [30]

March 19, 1954

The Referee: We have a continued hearing on the petition in reclamation in this Robert Steinberg matter.

Mr. Rosin: Mr. Lubin, I will show you three checks which I believe have been referred to in the testimony of both your client and Mr. Steinberg. These have been taken from the records of Robert Steinberg.

Mr. Lubin: Yes; I think they are the checks. I just want to check the dates. One was June 15th; one was May 1st, and then March 26th. Yes, these are the ones.

Mr. Rosin: We will offer these three checks as one exhibit; as Trustee's Exhibit——

The Referee: I will have to check through and find out what the next exhibit number is.

Mr. Lubin: We had the petitioner's exhibit and

that is the first receiver's exhibit. I think the invoices came in as the petitioner's exhibit.

The Referee: Yes; they have been in the file for some time.

Mr. Rosin: I would like to call Mr. Gold for the purpose of cross-examination.

The Referee: Yes; Mr. Gold, will you come up and be sworn? [31]

(Louis Gold came forward.)

The Referee: Just have a seat up here. You have been previously sworn in this matter.

LOUIS GOLD

having been previously sworn, testified on oath as follows:

By Mr. Rosin:

Q. Mr. Gold, do you have a list of the furniture that was the property of Mr. Steinberg that you took in for the purpose of giving a credit against any transactions you made with him on the new furniture? A. Yes, I have.

Q. Do you have it with you? A. No, sir.

Q. Can you tell us what it is? Can you go down the line from memory and tell us?

A. I cannot testify from memory on furniture.

Q. But you do have such a list?

A. Yes, sir.

Q. Of each and every item that was taken in?

A. We have the pick-up receipts of every item that was picked up.

(Testimony of Louis Gold.)

Q. That which was in his premises in January, 1953, that was taken in by you?

A. That's correct.

Q. I believe you said that the furniture had a value of [32] around \$500? A. Yes; \$500.

Q. Mr. Steinberg first testified he believed it was valued somewhere around eight or nine hundred dollars—at first he said \$1,000 and then he said eight or nine hundred dollars?

A. He was wrong.

Q. Was that a verbal agreement?

A. The transaction was never completed.

By the Referee:

Q. I know; but when you got the furniture, which was quite some time before this bankruptcy, when you picked the furniture up didn't you give him credit on your books?

A. No, because we never decided on the price to charge him for the furniture. It was all on a rental basis up to that time.

Q. (By Mr. Rosin): What was the agreement as to what would be the disposition of the furniture you were taking in?

A. To allow \$500 against the furniture he was to rent, until the time he purchased.

Q. In other words, you were giving a \$500 credit against the furniture he was to rent until he purchased it? A. Right.

Q. What was to be the deciding factor as to when the rent changed to a purchase? [33]

A. After we had put in all of the furniture and

(Testimony of Louis Gold.)

we would come to an agreement on how much the amount was.

Q. I believe the very last pieces that were delivered was some time in—I see there is one invoice of December 10, 1953, but the bulk of the items were all in the early part of 1953, May up to June or July, 1953; is that right? A. I believe so.

Q. And you received \$300 in checks from him, which are now the receiver's exhibits; you testified to that?

A. We applied that \$300 to purchases that were made over the 'phone and not consummated by myself, as credit. They were not even entered as rental figures.

Q. (By the Referee): How is this money entered in your books?

The Witness: Do you have that?

Mr. Lubin: I have a copy of it here. I will give it to the Referee.

The Referee: Go ahead with your examination.

Q. (By Mr. Rosin): Now, Mr. Gold, in the invoices that are now in as the petitioner's exhibits I notice among those invoices there are a few that are headed, "Delivery Receipts."

A. Everything is delivery receipts.

Q. I am calling your attention to the petitioner's exhibit. A. Those are only copies. [34]

Mr. Rosin: No; I believe those are originals.

The Witness: Yes.

Mr. Rosin: I will point to certain ones that have the notation, "Delivery Receipt." I am referring to

(Testimony of Louis Gold.)

one that is dated June 10, 1953, and has on the top, in regular print, "Delivery Receipt Number D-1163"—

The Witness: Yes. You will see this was made out by a salesman; it was a telephone order. I was probably out of town or something. It was subsequently sent out and perhaps charged as a charge; I don't know.

Mr. Rosin: Then another item, dated April 28, 1953, and marked, "Delivery Receipt Number D-156," and refers to a salesman by the name of Silbert.

The Witness: Right.

Q. Would you say the explanation of that is the same as the other?

A. I presume so. All of those are followed up by four or five different papers; different forms.

Q. Do you have those papers with you?

A. No.

Mr. Rosin: Then let's just refer to the papers before us.

Q. These two delivery receipts I have shown you, do you have duplications on them?

A. I don't know. I don't have the papers in my pocket.

Q. Well, do you find any duplications in these?

A. I don't see any duplications here. [35]

Mr. Lubin: How many of those do you have that are labelled, "Delivery Receipts"?

Mr. Rosin: Two of them.

Mr. Lubin: What are they?

(Testimony of Louis Gold.)

The Witness: One 42x22 Keystone gray storage cabinet.

Q. (By Mr. Rosin): Now, Mr. Gold, calling your attention to these two particular items marked, "Delivery Receipt," now those are different and separate and apart from the regular invoices?

A. No; they are just the same as these right here.

Q. In other words, Mr. Gold, the writing or printing on the bottom of the document that says, "Delivery Receipt," is the same as that that is in the invoice?

A. Yes, it is, I believe. If you can read it, I will know exactly.

Mr. Rosin: You go ahead and read it; I want you to read it.

The Witness: My glasses are not good enough to read the fine print, but may I explain?

Mr. Rosin: Just answer the question.

Q. Is it the same, or does it appear to be the same?

A. I cannot tell you because I cannot read that fine print.

Mr. Lubin: The document speaks for itself.

The Referee: Well, read it to him if you want to question [36] him.

(Witness reads document.)

A. It is exactly the same.

Q. Now, Mr. Gold, isn't it a fact that you changed the form of your invoice and delivery slips

(Testimony of Louis Gold.)

after the time you made the original transaction with Mr. Steinberg and you are now using a document entitled, "Delivery Receipt"?

A. We have been using the same document and the same form as here for the last fifteen years.

Q. You misunderstood me. Isn't it a fact you are now using that invoice, the form that is the invoice dated June 10, 1953, which has the words, "Delivery Receipt" on it? Isn't that the form you use now rather than the other one that has no heading at the top?

A. No; we use both of them and they are exactly the same.

Q. When you sent the form to the receiver you used the document that had "delivery receipt" on it, didn't you?

A. The records speak for themselves.

Mr. Rosin: Let me show you the copies which we received from your attorney, Marshall Abbott, and your invoices on which one of them has at the top, "Delivery Receipt."

Mr. Lubin: It is very apparent the attorney had the wrong form.

The Referee: Just a moment, please.

Mr. Lubin: I am just making an objection, your Honor. [37]

The Witness: The first thing we do is to write up on one paper—we have four different types of copies—at the discretion of the salesman or the shipping clerk, they write it up on one of these four copies. Maybe the forms have been changed in the interim but on everything that goes out we

(Testimony of Louis Gold.)

have the salesman who comes along and writes up the order, we have that same thing in every one, "Title Retaining Contract," and on every sale that is made the customer is told it is a title retaining contract.

Q. (By Mr. Rosin): Do you have a separate contract for cash sales?

A. Every receipt has this same thing in it. On every sale that is made in the place we tell the customer it is our property until it is paid for. The only time it might not be a contract is when a person issues a purchase order. With the exception of the purchase order, otherwise on every sale we make we tell the person it is a title retaining contract and it is our property until he pays for it.

Q. (By the Referee): If he pays cash for it do you use the same invoice form?

A. I presume every one of our invoices, except the ones that are sent out to corporations, have the title retaining contract on it.

Q. Don't you know?

A. No, I don't, but I presume so. I instruct everyone [38] to have it that way, because that is the way we do our business, on a title-retaining business.

Q. (By Mr. Lubin): Incidentally, Gold Desk & Safe Co. is a fictitious name; you are the sole owner?

A. That's right.

Q. And you have owned it for how long?

A. Seventeen years.

(Testimony of Louis Gold.)

Q. In connection with this transaction with Mr. Steinberg there are no other written documents, other than those which are before the Court now; is that correct?

A. I don't know what you call written documents.

Q. Is there anything else you have in your possession or in your records that has not been produced for this Court besides those we have here from Mr. Steinberg? A. I don't believe so.

Q. And you do have a record of the furniture you took in from Mr. Steinberg's office?

A. Yes.

Q. (By Mr. Rosin): You can produce it?

A. Yes; we can produce the delivery tickets on every pick-up that was made.

Mr. Rosin: We would like to have those here for the purpose of introducing them as exhibits.

Mr. Lubin: I will see that you get them. [39]

Q. (By Mr. Rosin): Mr. Gold, at what conversation did you and Mr. Steinberg discuss the payment or possible payment for the furniture he was buying?

A. At the time I went to his office.

Q. The first time? A. That's right.

Q. Was that before he had seen the furniture?

A. I think he was in the store before and looked at some of the furniture. One of the salesmen, I believe, showed him some furniture.

Q. Then you went out there yourself?

A. Yes, sir.

(Testimony of Louis Gold.)

Q. And you made the arrangements insofar as the furniture that he got; you gave the figures on that? A. Yes, sir.

Q. Now, Mr. Steinberg has testified that according to the figures you gave him, the cost there of the furniture he was going to buy was thirty-two or thirty-three hundred dollars, and that there was an allowance on the furniture you were to take of seven or eight hundred dollars, leaving a net amount of twenty-two or twenty-three hundred due, upon which he has paid three hundred?

A. That would be wrong.

Q. In what way?

A. There was no exact figures on the merchandise, except [40] that if he would take so many desks it would be so much per desk; if he took one type it would be so much; when he took the big desk it would be so much; and the same thing as to various items, and what he would take.

Q. Was there any period of time in which he was to make up his mind as to how much furniture he would take or when he would take it? Was there any question about when he was to make up his mind?

A. No; no question about when he was to make up his mind, but the fact was he owed so much on the rental purchase——

Q. (By the Referee): What do you mean by rental purchase?

A. Well, all of the furniture is on a rental basis.

Q. That was verbal? A. Yes, sir.

(Testimony of Louis Gold.)

Q. What was the deal?

A. He was to pay us \$100 until he decided, but when he didn't send us the \$100, what was the use to write up a contract and stipulate the prices and so forth? It was still my furniture and I presumed there was no sense in making up a purchase contract and so forth.

Q. You told him this furniture was being rented to him at \$100 a month? A. Yes, sir.

Q. And later on if he wanted to buy it you would quote [41] him a price; is that right?

A. Yes, sir.

The Referee: I am badly confused.

Q. (By Mr. Rosin): The last payment of \$100 was June 17, 1953. I believe Mr. Steinberg filed his Chapter XI proceeding somewhere in January of 1954. Did you make any demand on him after June 17, 1953, for the \$100 rental that you speak of? Yes or no?

A. We made demands for money, yes. We made demands for money continuously and at all times.

Q. That is on the furniture he was holding?

A. We made demands for the rental money he was supposed to pay.

Q. Did you send written demands to him?

A. Most of my business was done over the telephone with him.

Q. In other words, it was all oral, the demands?

A. Yes; except when we found he had filed his petition, then we made a demand through my attorney.

(Testimony of Louis Gold.)

Q. When, if ever, did you tell Mr. Steinberg this furniture was on a rental basis to him and you were not going to sell it to him?

A. I didn't tell him I wasn't going to sell it to him at any time, because we were prepared to sell it at any time he agreed. [42]

Q. When did he quit paying you rental?

A. It was in June.

Q. Did he refuse to pay, or did you press him for it?

A. He said he didn't have any money and we felt sorry for him and didn't press him. We have a lot of people that owe us money that we don't press. May I present a further background of the case? Am I allowed to?

The Referee: Yes, if you can help us any. I am badly confused.

The Witness: Mr. Steinberg worked for my accountant, the man who was my accountant and who has my insurance account; then he went to work and went into business for himself. He got some furniture from me and was supposed to pay for it as he was able, and we sent it out on a title-retaining contract and he knew all of the time it was on a title-retaining contract and if he didn't pay for the furniture at any time we had a right to have it back, and it took him a very, very long time to pay for that furniture. In between time he went to one of our competitors, a stationery company, and got some furniture, and then he paid them—I don't know whether he paid them or not, it was

(Testimony of Louis Gold.)

Atlas Stationers—then he came back and got some more furniture from me and every time he got some he paid a little, and then he opened a big, elaborate place and my salesman told me about it and said, “You had better go over or you will [43] lose the deal,” and then I think he came in and looked around, and then I went over, and he told me what he wanted; it was my personal desk that he got; then he traded in the furniture for so much and he would pay me \$100 a month rental, and when he got all fixed up he would pay me for it. He had a lot of confidence in me, and it was a case of where we had done a lot of business before. So on that basis he paid me \$100 a month, and after we decided on the price he would continue to pay \$100 a month and we would have a title-retaining contract all of the time, and then after he paid us so much we would charge him interest on the other and he would have it.

Q. (By Mr. Rosin): Charge him interest on what?

A. After we agreed on the purchase price we would charge him so much, six per cent per annum, to carry it.

Q. How would a man, under those figures, know what he owed you?

A. After we delivered all of the furniture then we would sit down and make up a bill and charge him six per cent per annum on the unpaid balances.

(Testimony of Louis Gold.)

Q. How did it happen in this particular case you didn't follow that course?

A. Because the man didn't have any money. We got reports from my accountant, he owed some money, too, and he said, "He doesn't have any money and isn't doing any good," and if [44] I took his furniture away he would be out of business entirely, and I felt sorry for the man.

Q. Isn't it a fact that if you took the furniture away you wouldn't be able to get the six per cent per annum——

A. No. We are not in the loan business. We are in the furniture business.

Q. Do I understand this is also a basis upon which you sell merchandise: If anyone pays you any money, even by way of rental, as you say, if they are unable to pay the balance, anything they have paid in is lost?

A. It is a rental; sure.

Q. Is it liquidated damages or rental?

A. It is all on rental. Unless the party makes an agreement to pay so much down and so much a month, then it is a lease contract.

Q. (By the Referee): Were these three checks of \$100 each payments on the rental of furniture?

A. The way we put it on our books, I presume it is rentals, but I cannot tell you what my accountant is doing every day. I believe we gave him credit on certain charges that were made at a later date.

Q. Then it was an open account?

A. No; not an open account. It was billed out on a title-retaining contract. These items are all on a title-retaining contract. [45]

(Testimony of Louis Gold.)

Q. Well, according to this, he has paid for all of it but \$12.11?

A. The way it is set up on this, that is right.

Mr. Lubin: I understand these items he has delivered are not set up at all on that.

Mr. Rosin: Do you mean the \$100 does not even apply against this furniture?

The Witness: No; there was other deals that went out subsequent and it was put to that account.

Q. (By Mr. Rosin): Let me ask you, on the day you walked into his office and asked for his business, did he owe you anything then?

A. I can look at the records and tell you. He owed a \$159 balance.

Q. How much?

A. He owed \$159 at that time.

Q. On the day you walked in?

A. That's right; on the old account.

Q. So the \$300 couldn't have been in payment of that? A. No; because he paid more.

Q. Now, he had been doing business with you for three years prior to that time, had he not?

A. No; I think in 1951.

Q. About two years he had been doing business with you? A. Right.

Q. And he still owed you \$159 on this [46] furniture?

A. He paid the \$159 at the time he made the new deal.

Q. And then you gave him a \$500 credit on the furniture?

(Testimony of Louis Gold.)

The Referee: No; that does not appear.

The Witness: Nothing shows on there about that.

The Referee: But it does show he had a credit balance on three or four different occasions.

Q. (By Mr. Rosin): This statement that is before you, is that from your records or was that made up for the purpose of the Court?

A. No; this was taken right out of our books.

Q. And that is the ledger on Mr. Steinberg?

A. Yes; that is his account, right there.

Q. Do you have copies of the invoices or documents which have been sent Mr. Steinberg over a period of time?

A. We have copies of all of the invoices that were sent to Mr. Steinberg and everybody.

Q. Did you ever send him a statement of what he owed you?

A. At the end of the month we sent him a statement, except on this particular deal. That was just strictly \$100 a month until the deal was consummated, and the deal was never consummated because he didn't pay the \$100 per month rental.

Mr. Rosin: No further questions.

Q. (By Mr. Lubin): Mr. Gold, when you sell for cash, or if you sell on [47] a purchase order where title is to be transferred to the purchaser, is a debit entry of that merchandise set up on your books?

Mr. Rosin: Object to the question on the ground it is incompetent, irrelevant and immaterial and

(Testimony of Louis Gold.)

not within the issues, and calls for the conclusion of the witness.

The Referee: I will sustain the objection.

Q. Now at the time the discussion was had, the first discussion with Mr. Steinberg, was there anything mentioned about this merchandise being purchased on open account? A. No.

Q. Now the document you have, which has been presented to you here, that represents the original record insofar as Mr. Robert Steinberg is concerned? A. It does.

Q. And that is kept in the ordinary course of business? A. It is.

Q. And it is kept by your bookkeeper?

A. Yes, sir.

Q. Under your supervision? A. Yes.

Mr. Lubin: I will offer this as petitioner's next in order.

The Referee: Petitioner's "2."

Mr. Rosin: We will make an objection; no foundation laid, your Honor. [48]

The Referee: I will overrule the objection.

Mr. Lubin: I have no further questions.

Mr. Rosin: No further questions.

The Referee: You may step down.

(Witness leaves the stand.)

Mr. Lubin: I would like to submit, if the Court please, one proposition in view of the cases that have been decided here in California in connection with matters of this kind. The cases have held that

rental agreements, lease agreements, are all considered as conditional sales agreements. It doesn't make any difference whether you lease it or whether you agree to sell it at a stipulated price with monthly payments and a title-retaining clause, or whether it is just merely a rental proposition. Under the cases, and I think your Honor knows those cases, they are all considered conditional sales agreements. I don't have to tell your Honor that the transfer of title is a matter of intention of the parties.

The Referee: It is getting along here; it is close to noon. I am pretty rusty on the subject of conditional sales contracts and rental lease agreements. If you will give me, say, within the next week, a short memorandum.

Mr. Lubin: I will be glad to do that.

The Referee: The great difficulty that is involved here is this inconsistency in Mr. Gold's own testimony. He says they entered into a rental agreement and then we find [49] he has this open account with Steinberg and some \$300 which was paid in on the rental agreement and credited to this open account. Then, furthermore, Mr. Gold has testified that this other stuff, the secondhand stuff that was traded in and that he took back, was to be credited to the rental account, and we find, apparently, there is not a scratch of paper or an entry of any kind in the books that would indicate that has been credited to anything, so it is a very inconsistent story, as far as I am concerned.

Mr. Lubin: We appreciate this is a very unorthodox way of doing business.

The Referee: As I say, this is a rental deal and this old furniture was to be applied to the rentals, and it has not been done.

Mr. Lubin: Of course we submit here that whether it is a rental deal or a conditional sales contract deal, still title has not changed.

The Referee: This either—or matter is not too good either. We have to find out what kind of a deal it was.

Mr. Rosin: Another fact: How can anyone else permit someone to sign a contract that binds him? We have invoices here signed by three other people.

The Referee: I understand, but if that property was delivered with the agreement that title was to remain in Mr. Gold—— [50]

Mr. Lubin: We have three or four of the main memorandums, representing the bulk of this merchandise. Mr. Gold signed twice, the title-retaining contract and the receipts. He admitted he signed on two different occasions.

The Referee: I understand that but this is one of those things. Let me tell you this: Mr. Gold and other people in that business had better take a little heed. This fine type print is not necessarily a contract; it is probably this and/or business. When you get into this and/or, you are on pretty shaky ground.

Mr. Lubin: I appreciate that.

The Referee: I think Mr. Gold had better sit

down and talk to his attorneys so he won't get himself into the position he is here.

Will you give me a memorandum by the end of next week?

Mr. Lubin: I will, your Honor.

Mr. Rosin: Do you want one from me?

The Referee: If you have anything to submit on it.

Mr. Lubin: And after I submit the memorandum, the matter will stand submitted?

The Referee: That's right.

Mr. Lubin: And there will be no further continuance here?

The Referee: That's right.

(Court adjourned.)

[Endorsed]: Filed June 22, 1954, Referee. [51]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered from 1 to 49, inclusive, contain the original Petition Under Chapter XI of the Bankruptcy Act; Approval of Petition and Order of Reference; Order of Adjudication; Petition of Reclamation; Memorandum by Referee; Findings of Fact, Conclusions of law and Order of Referee; Petition for Review; Petitioner's Exhibits 1 and 2 and Respond-

ent's Exhibit A; Certificate on Review; Order re Findings of Fact, Conclusions of Law and Order Thereon; Notice of Appeal and Designation of Record on Appeal for a full, true and correct copy of Minutes of the Court for September 13, 1954, which, together with Reporter's Transcript of Proceedings on February 26, March 17 and March 19, 1954, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00, which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 19th day of November, A.D. 1954.

EDMUND L. SMITH,
Clerk;

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14584. United States Court of Appeals for the Ninth Circuit. Louis Gold, Doing Business as the Gold Desk and Safe Company, Appellant, vs. H. M. Gerson, Trustee in Bankruptcy of the Estate of Robert Steinberg, Doing Business as Pacific Litho-Art Company, Amalgamated Creditors Exchange and Jerry's Market, Bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed November 22, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals,
the Ninth Circuit

No. 14584

LOUIS GOLD, Doing Business as GOLD DESK
& SAFE COMPANY,

Appellant,

vs.

H. M. GERSON, Trustee in Bankruptcy in the
Matter of ROBERT B. STEINBERG, Bank-
rupt,

Appellee.

STATEMENT OF POINTS UPON
WHICH APPELLANT RELIES

Comes now the Appellant in the above-entitled cause and sets forth a statement of the points on which he intends to rely:

1. The execution of the invoices and the printed agreements contained therein by the bankrupt constituted an agreement wherein title to the personal property sold would remain in the seller.

2. Where the prices for the goods sold was not ascertained by the parties at the time the bankrupt signed the title retention agreement on the invoices; this constitutes an executory contract with a reservation of title until the final contract and the ascertainment of price shall have been agreed by the parties.

3. Title to the personal property did not pass to

the bankrupt, and does not now rest in the Trustee in Bankruptcy.

4. The parties did not intend that title to the personal property in question should pass at the time of delivery and at the time the invoices were executed by the bankrupt.

5. Under the facts in this case, and under the evidence, the transaction was a rental or lease agreement with a reservation of title in the seller until the rental payments equal the purchase price of the personal property sold, and that such an agreement is a conditional sales contract.

Dated November 26, 1954.

ALFRED LUBIN &
MARSHALL ABBOTT,

By /s/ ALFRED LUBIN,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 29, 1954, U.S.C.A.

United States Court of Appeals

For the Ninth Circuit

LOUIS GOLD, doing business as the
GOLD DESK AND SAFE COMPANY,
Appellant,

vs.

H. M. GERSON, Trustee in Bankruptcy
of the Estate of ROBERT STEIN-
BERG, doing business as PACIFIC
LITHO-ART COMPANY, AMALGA-
MATED CREDITORS EXCHANGE
and JERRY'S MARKET, Bankrupt,
Appellee.

Appellant's Brief

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FILED

FEB 25 1955

PAUL P. O'BRIEN,
CLERK

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United States Court of Appeals

For the Ninth Circuit

LOUIS GOLD, doing business as the
GOLD DESK AND SAFE COMPANY,
Appellant,

vs.

H. M. GERSON, Trustee in Bankruptcy
of the Estate of ROBERT STEIN-
BERG, doing business as PACIFIC
LITHO-ART COMPANY, AMALGA-
MATED CREDITORS EXCHANGE
and JERRY'S MARKET, Bankrupt,
Appellee.

No. 14584

Appellant's Brief

STATEMENT OF PLEADINGS

This is an appeal from an Order of the United States District Court dated September 15, 1954 (Transcript of Record, page 27) adopting the findings of the Referee in Bankruptcy and confirming the Order of the Referee denying the petition of Louis Gold, doing business as the Gold Desk and Safe Company, the Appellant, for the recovery of certain furniture and fixtures.

The proceedings in connection with Robert B. Steinberg, a Bankrupt, was initiated by a Chapter Eleven

proceeding for an arrangement filed in the United States District Court for the Southern District of California, Central Division (Transcript of Record, page 3). The debtor's petition was approved and the Order of Reference to David B. Head, Referee in Bankruptcy, under Section 322 of Chapter Eleven of the Bankruptcy Act, was entered on January 27, 1954 (Transcript of Record, page 10). The Order of Adjudication in Bankruptcy was dated April 21, 1954 (Transcript of Record, page 11).

On February 19, 1954 a Reclamation Petition was filed by Appellant for the recovery of certain named office furniture and equipment from H. M. Gerson, Trustee in Bankruptcy (Transcript of Record, page 12).

There was a hearing on said Petition before the Honorable David B. Head, Referee in Bankruptcy, on February 26, 1954. A memorandum on the Petition for Reclamation was filed on June 7, 1954 (Transcript of Record, page 18). Findings of Fact, Conclusions of Law and Order thereon was entered by said Referee on January 24, 1954 (Transcript of Record, page 20). A Petition for Review from the Order of Referee denying petition for Reclamation Petition was filed by Appellant on July 3, 1954 (Transcript of Record, page 24), and the matter was heard by the Honorable Leon R. Yankwich, United States District Judge, on September 13, 1954. The Order adopting the findings of the Referee and approving the Order of the Referee was entered on September 15, 1954 (Transcript of Record, page 27).

It is submitted that the Order appealed from is a final judgment on the matter and that this Court has jurisdiction to hear this appeal under U.S.C.A. Title 28, Article 225.

STATEMENT OF THE CASE

Robert B. Steinberg, the bankrupt, was by profession a Public Accountant. His other interests consisted generally of the following: He operates a collection agency; he is the sole owner of a printing company known as Pacific Litho-Art Company; he has a partnership interest in a hotel and an apartment building; he has an interest in an accounting firm, and owns a grocery store (Transcript of Record, page 8).

On January 23, 1953 the Appellant entered into a transaction for the acquisition by the bankrupt of certain office furniture and office equipment (Transcript of Record, page 32). The selection of the various items were made by the bankrupt, and although tentative prices were discussed, no definite purchase price for the furniture and equipment was set up. The approximate amount of the furniture selected by the bankrupt was \$4,000.00 (Transcript of Record, page 33). It is uncontradicted that the bankrupt received all of the furniture and equipment listed in the Reclamation Petition. The documentary evidence consists in part of several invoices and/or delivery sheets (Petitioner's Exhibit I). It will be noted that the invoices dated February 14, 1953 and February 16, 1953 list

the major items of the furniture sought to be reclaimed. At the bottom of each document is the following:

“It is agreed that the purchaser shall pay \$..... on execution of this agreement and the sum of \$..... on each....., commencing.....

The purchaser, and/or lessee, agrees that title to merchandise listed herewith, shall remain in Gold Desk & Safe Co. until entire purchase price has been paid and purchaser and/or lessee, agrees to permit removal of same, with or without process of law, if not paid for within time stipulated, and to pay any and all expenses for collection or removal of said merchandise including a reasonable attorney fee. It is further understood that any sums paid on account prior to any repossession of above listed merchandise shall be as and for liquidated damages. At the option of the seller, upon default of any single payment, the said seller may declare the entire balance due, and sue for the purchase price thereof. Time is of the essence of this Agreement.

The above goods received in good order.

..... Signed.....

Buyer.

By.....”

Both the alleged agreement and the receipt had been signed by the bankrupt. None of the blank spaces in the above had been filled in except the signatures that are subscribed thereon.

The testimony of the Appellant discloses that some of the bankrupt's old furniture was to be taken in trade

and an allowance of \$500.00 would be made; that the bankrupt agreed to pay the Appellant a rental of \$100.00 a month, which was to be on account until the purchase price of the furniture was to be determined; and after the determination of the purchase price the Bankrupt was to pay \$100.00 per month until the purchase price was paid (Transcript of Record, page 32 and page 33). It is uncontradicted that the parties never got together and determined the purchase price of the equipment.

It is to be noted that the Appellant's account record does not disclose a charge for the purchase price of the furniture nor a credit for the Bankrupt's old furniture as a trade-in; that the records do show a credit on account of the following payments made by the Bankrupt after February 14, 1953, to wit: March 30, 1953 \$100.00; May 1, 1953 \$100.00; June 7, 1953 \$100.00 (Petitioner's Exhibit No. 2). This is admitted by the Appellees.

The testimony of the Bankrupt discloses that the gross amount of the new furniture was over \$3,000.00, and that he would receive an allowance in the neighborhood of \$800.00 for his old furniture (Transcript of Record, pages 43 and 44); that no definite price was determined; and that the only agreement that was made by the parties was that the Appellant would allow him to pay direct at the rate of \$100.00 a month, and that the account would not be put through any finance company nor would any interest be charged on the account (Transcript of Record, page 45).

On cross examination the Bankrupt testified that the signatures on the invoices dated February 14, and February 16, 1953 were his, and that he examined the invoices before signing them, and that he did sign the agreement clause on the invoice and the receipt on the invoice (Transcript of Record, pages 49, 50 and 51); and that the Appellant told him that as soon as he could, they would get together and determine the exact amount of the purchases, the amount of the trade-in allowance and preparation of the necessary papers (Transcript of Record, page 52).

There is no evidence in the record that the transaction was to be on an open account basis. At the first hearing the Referee made the statement "What you have here is an executory contract under Section 70-B of the Bankruptcy Act." (Transcript of Record, page 35).

ISSUES INVOLVED

Appellant's Contentions:

1. That the documents signed by the Bankrupt were valid title retention agreements.

2. That the original transaction was an executory contract between the parties to be finally consummated on the determination of the purchase price, and, that during such interim the title to the furniture would remain in the seller.

3. That the goods were not sold on open account, nor was there any intention of the parties that same was to be sold on open account.

Appellee's Contentions:

1. That the goods were sold to the Bankrupt on an open account and that the title to same passed to the Bankrupt.

2. That there was no agreement between the parties wherein title to the furniture was to be retained in the seller.

SPECIFICATION OF ERRORS UPON WHICH APPELLANT RELIES

I. The execution of the invoice and the printed agreements contained therein by the Bankrupt constituted an agreement wherein title to the personal property sold would remain in the seller.

The Referee's memorandum stated that it was impossible to make a finding that any agreement was entered into between the Petitioner and the Bankrupt by which title to the furniture was retained by the Appellant (Transcript of Record, page 19).

Findings of Fact No. IX provided that there was no agreement between the Petitioner and the Bankrupt by which title to the personal property in question was to be retained by said Petitioner.

II. Where the prices of goods sold were not ascertained by the parties at the time the Bankrupt signed the title retention agreement on the invoices; this constitutes an executory contract with a reservation of title until the final contract and the ascertainment of price shall have been agreed by the parties.

Findings of Fact No. X provided that no verbal contract was entered whereby the title to the property in question was to be retained by the Appellant (Transcript of Record, page 22). The referee concluded, as a matter of law, that there was no contract in existence by which title was retained to the personal property in question by the Appellant (Transcript of Record, page 23).

III. Title to the personal property did not pass to the Bankrupt, and does not now rest in the Trustee in Bankruptcy.

The memorandum by the Referee provided that there being no contract by which title was retained, the delivery of the property to the Bankrupt passed title to him, and that the title now rests in the Trustee (Transcript of Record, page 19).

Paragraph III of the Conclusions of Law of the Referee provided that when the personal property in question was delivered to the Bankrupt, title did then pass to the Bankrupt, and now rests in the Trustee herein, H. M. Gerson (Transcript of Record, page 23).

IV. The parties did not intend that title to the personal property in question should pass at the time of delivery and at the time the invoices were executed by the Bankrupt.

V. Under the facts in this case, and under the evidence, the transaction was a rental or lease agreement with a reservation of title in the seller until the rental payments equaled the purchase price of the personal property sold, and that such an agreement is a conditional sales contract.

Findings of Fact IX and X provide that no agreement was entered into between the parties, by which title to the personal property in question was to be retained by said Petitioner; and that no verbal contract to this end was made (Transcript of Record, page 22). On the Conclusions of Law the Referee held that the

written material on the invoices heretofore mentioned does not constitute a contract (Transcript of Record, page 23).

ARGUMENT

I.

The only witness appearing for the Appellee was Robert B. Steinberg, the Bankrupt. He admitted that the invoices dated February 14, 1953 and the invoice dated February 16, 1953 on which there was a title retention agreement *and* a receipt bore his signature; and that he examined the invoices containing the agreement clause and the receipt before signing same (Transcript of Record, pages 49, 50 and 51). He further testified that the Appellant told him that as soon as he could they would get together and determine the exact amount of the purchases, the amount of the trade-in allowance and the preparation of the necessary papers (Transcript of Record, page 52).

The Findings of Fact by the Referee, that is, Finding of Fact No. III and No. IV, stated that the transaction between the Bankrupt and the said Louis Gold was evidenced by certain documents, including invoices and delivery sheets, and that certain of the invoices bear the signature of Robert B. Steinberg, the Bankrupt (Transcript of Record, page 21). Finding of Fact No. VI stated that none of the blank spaces in the printed matter was filled in. Finding of Fact No. IX provided that there was no agreement between the

Petitioner and the Bankrupt by which title to the personal property in question was to be retained by said Petitioner (Transcript of Record, page 22).

It is submitted that there is no evidence in the record justifying Finding No. IX.

The Title Retention Agreement and the receipt for the merchandise were distinct and separate, requiring separate signatures. The statements were contained within the body of the invoices which plainly purported to embrace the agreement between the parties, which thereupon became binding upon acceptance of the furniture, regardless of whether the person accepting had actual knowledge of all the terms. They were an integral part of an accepted agreement embodied in the writing contractual in its nature, and could no more have been ignored than any other provisions of a written contract. The fact that the amount of the purchase price was a blank space, nevertheless does not change the above stated rule.

Professor Williston in his treatise on CONTRACTS (Volume I, Page 165) states:

“The sole question seems to be whether the facts present a case where the person receiving the paper should, as a reasonable man, understand that it contained the terms of the contract which he must read at his peril and regard as part of the proposed agreement.”

The general rule can be stated that an invoice, standing alone is not a contract; unless there is a statement

thereon and the buyer assents or he is charged with the knowledge of such statement as to the transactions.

India Paint Co. vs. United Steel Products Corp., 123 Cal. App. 2d, 597, 608.

In the instant case, the Bankrupt read the invoices and signed the title retention agreement contained thereon, as well as the receipt for the merchandise.

A case on disclaimer of a warranty was decided in *Lomari vs. Globe*, 35 Cal. App. 2d, 248, where it was held that in a suit for damages resulting from the death of hogs due to a lack of effectiveness of the serum, the language on the labels of all of the bottles of medicine "No control of diagnosis, method of administration, or handling of this Serum after it leaves our possession, we waive all responsibility following its use" is to be construed to be a disclaimer or at least a limitation on the liability of the defendant for an alleged warranty.

In the case of *Hawkins vs. Frick-Reid*, 154 Fed. 2d, p. 88, involving an action to recover the purchase price of an allegedly defective drill pipe on the grounds of breach of an express and implied warranty, the court held that the invoice was the contract between the parties, and the dispute was simply as to the construction of the language therein.

Let us assume that the invoice of the property in question and the alleged title retention agreement were two separate documents, and that the Bankrupt had signed the title retention agreement even though the

spaces as to the amounts of the purchase and the payments to be made were left blank. Can Counsel for Appellee contend that inasmuch as the spaces were left blank, the agreement does not constitute a contract where in title to the merchandise would be retained in the seller? At the trial Counsel for the Appellee contended that the document was a mere receipt and not a title retention agreement. We admit that the invoice has a receipt printed at the bottom of the document but no one lose sight of the fact that *in addition* to the receipt was a specific title retention agreement which was signed by the Bankrupt. Under the evidence and the law applicable thereto, we fail to see how any conclusion, other than upholding the invoice to be a title retention agreement, can be made.

II.

The evidence shows that on January 23, 1953 the Appellant and the Bankrupt entered into a transaction for the sale and purchase of office furniture and equipment (Transcript of Record, pages 32 and 33); that the Bankrupt agreed to pay \$100.00 a month until the purchase price was paid, which was to be determined at the time the Bankrupt's office was completed (Transcript of Record, page 32); that until a formal contract was drawn up the furniture was on a rental basis (Transcript of Record, page 64); and that the goods were not sold on an open account (Transcript of Record, page 68). The Bankrupt testified that the only agreement that was made was that the Appellant would let him pay it out directly to him at the rate of \$100.00

per month, and that the deal would not be put through a bank, nor would any interest be charged; that three \$100.00 payments were made to the Appellant which were marked "On Account" (Transcript of Record, page 45).

It seems quite clear that here is a typical executory contract where title is to be retained by the seller until the parties get together on a definite purchase price, the buyer agreeing to pay on account payments in the sum of \$100.00 per month. The Referee quickly analyzed the situation when he stated at the hearing "What you have here is an executory contract under Section 70-B of the Bankruptcy Act" (Transcript of Record, page 35). What possessed the Referee to change his thinking cannot be reconciled. Certainly no subsequent testimony of the witnesses could affect the original arrangement.

Where in an executory agreement the title is to remain in the vendor, and the price is to be paid in future installments, the sale is conditional and not absolute.

Rogers vs. Bachman, 109 Cal., p. 552;

Perkins vs. Mettler, 126 Cal., p. 100.

Where goods are sold and possession is given to the buyer, under an agreement that the buyer shall make installment payments until the purchase price is paid, and that title to the goods shall remain in the seller, the sale was conditional upon payment and title did not vest in the buyer.

Peronnet vs. Ralph, 112 Cal. App., p. 97;

Lunny vs. Labrucherie, 103 Cal. App. 2d, p. 865.

The fact that the parties left blank the spaces in the agreement for the ascertainment of the purchase price and the amount of the monthly payments does not change the nature of the contract. Strictly speaking, the agreement in question was not a sale of any kind, but only an agreement to sell and the conditional vendee gets nothing more than a conditional right of possession.

Bice vs. Arnold, 75 Cal. App., p. 629;

Hegler vs. Eddy, 53 Cal., p. 597.

III.

It is a fundamental proposition of law that the nature of the transaction must be determined by the intention of the parties.

Peronnet vs. Ralph, 112 Cal. App., p. 97;

Masonic Temple vs. Stockholders Auxiliary, 130 Cal. App., p. 234;

Hannin vs. Fisher, 5 Cal. App. 2d, p. 673.

In determining whether or not title passes, the intention of the parties must be gathered from their words, actions and conduct, and the statutory definitions of intention must be applied.

Section 1738, *Civil Code of California*;

Wilson vs. Buchenau, 43 Fed. Supp. 272;

Nead vs. Specimen Hill, 52 Cal. App. 2d, 475.

The record conclusively shows that it was *not* the intention of the parties that the goods be sold on open account, title passing to the buyer. No evidence has been introduced by Appellee proving a sale on open account. As a matter of fact, such contention was specifically denied by Appellant (Transcript of Record, page 68). The books of account of this transaction was introduced into evidence. There is no entry thereon in connection with the charge on open account of the goods in question; nor does the records disclose the credit for the trade-in allowance for Bankrupt's old furniture (Petitioner's Exhibit No. 2).

The Bankrupt read and signed the title retention clause contained in the invoices; he knew that the furniture was to be paid for on the installment plan. The Bankrupt was a Public Accountant and a businessman, familiar with the installment business, and should have known that it was usual and customary for furniture to be purchased on the installment plan with a title retention agreement. In considering all of the facts and circumstances connected with the transaction, and the testimony of the Bankrupt as to the agreement (Transcript of Record, page 45), it seems clear and unequivocal that it was the intention of the parties that title to the goods was to remain in the Appellant until the parties could get together on the purchase price and execute a formal contract. Any other construction would be an absurdity.

IV.

It is respectfully submitted that under the facts in this case and under the evidence, both oral and documentary, the initial transaction between the parties was a rental agreement with a reservation of title in the seller until they could get together on the price of the goods, and then enter into a formal agreement. (Transcript of Record, page 32 and page 33). Until such time as the parties could get together, the payments to be made by the Bankrupt would be \$100.00 a month. These rental payments would be credited "on account" of the purchase price *when ascertained*. This was clearly the intention of Appellant when the entries of the three payments were made on his books. There is no evidence in the record of any different intention.

The authorities in this state hold that a rental agreement of personal property is in effect a conditional sales agreement.

U. S. Machinery vs. International Metals, 74
Cal. App. 2d, p. 5;
22 Cal. Jur., p. 1097;
Peronnet vs. Ralph, 112 Cal. App., p. 97.

In conclusion we respectfully submit that the learned Judge of the District Court erred in adopting the findings of the Referee and affirming his order. In view of the above points and authorities, it is urged that the judgment of the District Court be reversed and that the Appellant be awarded the possession of the

articles of furniture and equipment described in the
Reclamation Petition on file herein.

Respectfully submitted,

ALFRED LUBIN and
MARSHALL ABBOTT

Attorneys for Appellant.

No. 14584

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOUIS GOLD, doing business as the GOLD DESK AND SAFE
COMPANY,

Appellant,

vs.

H. M. GERSON, Trustee in Bankruptcy of the Estate of
ROBERT STEINBERG, doing business as PACIFIC LITHO-
ART COMPANY, AMALGAMATED CREDITORS EXCHANGE
and JERRY'S MARKET, Bankrupt,

Appellee.

APPELLEE'S BRIEF.

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MAR 26 1955

PAUL P. O'BRIEN, CLERK

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No. 14584

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOUIS GOLD, doing business as the GOLD DESK AND SAFE
COMPANY,

Appellant,

vs.

H. M. GERSON, Trustee in Bankruptcy of the Estate of
ROBERT STEINBERG, doing business as PACIFIC LITHO-
ART COMPANY, AMALGAMATED CREDITORS EXCHANGE
and JERRY'S MARKET, Bankrupt,

Appellee.

APPELLEE'S BRIEF.

We wish to call the Court's attention to the Appellant's Statement of the Case, Specification of Errors, and Argument. All contain numerous exaggerated, distorted and argumentative statements to the effect that "There is no evidence in the record that the transaction was to be on an open account basis." (Appellant's Br. p. 6.) "Can counsel for the Appellee contend that inasmuch as the spaces were left blank * * *." (Appellant's Br. p. 13.) "That until a formal contract was drawn up the furniture was on a rental basis; and that the goods were not sold on an open account. (Appellant's Br. p. 13.) "The rec-

ord conclusively shows that it was not the intention of the parties that the goods be sold on open account. No evidence has been introduced by Appellee proving a sale on open account" (Appellant's Br. p. 16), etc., and to respectfully submit to the Court that the Referee made his Findings of Fact and Conclusions of Law based upon the testimony of the parties and the documentary evidence presented and that there was a definite conflict in the evidence presented, the following parts of the Transcript of Record clearly demonstrating that conflict of evidence:

"The Referee: The great difficulty that is involved here is this inconsistency in Mr. Gold's own testimony. He says they entered into a rental agreement and then we find he has this open account with Steinberg and some \$300 which was paid in on the rental agreement and credited to this open account. * * *." [T. R. p. 72.]

Testimony by Mr. Gold as shown on pages 69 and 70 of the Transcript of Record indicates that payments were credited to an open account. Testimony of Mr. Gold at page 60 of the Transcript of Record admits that the same form was used for delivery receipts as for invoices and testimony on page 62 of the Transcript of Record that the same form was used for cash sales as was used in title retention agreements. The entire examination of Robert B. Steinberg of March 17, 1954, is printed on pages 40 to 55 of the Transcript of Record. We therefore wish to call the Court's attention to the fact that the entire argument of the Appellant is based upon his version of the facts rather than upon the facts as found by the Referee.

Jurisdictional Statement.

The original jurisdiction of the District Court was invoked by the bankrupt by filing his Petition for Arrangement under Chapter XI of the Bankruptcy Act [T. R. p. 3] and thereafter by the approval of the Debtor's Petition and Order of Reference to David B. Head, Referee in Bankruptcy, under Section 322 of Chapter XI of the Bankruptcy Act entered on January 27, 1954 [T. R. p. 10] resulting in an Order of Adjudication in bankruptcy of April 21, 1954. [T. R. p. 11.]

The summary jurisdiction of the Referee in Bankruptcy was invoked under Section 2a(8) of the Bankruptcy Act by the Appellant filing a Reclamation Petition on February 19, 1954 [T. R. p. 12] and a hearing had thereunder on February 26, 1954.

The jurisdiction of the District Court on review was invoked by the Appellant by filing his Petition for Review on July 3, 1954 [T. R. p. 20] under the provisions of Section 39c of the Bankruptcy Act directed toward the Referee's Findings of Fact, Conclusions of Law and Order thereon of January 24, 1954. [T. R. p. 20.]

The jurisdiction of this, the Court of Appeals of the United States for the Ninth Circuit, was invoked by the Appellant herein, under the provisions of Section 24a of the Bankruptcy Act by his Notice of Appeal [T. R. pp. 28-29] directed towards the Order of the Honorable Leon R. Yankwich, United States District Judge, of September 15, 1954, adopting the Findings of Fact, Conclusions of Law and Order of the Referee of June 24, 1954. [T. R. pp. 27-28.]

Statement of the Case.

On June 23, 1953, the Appellant and within Bankrupt entered into a transaction whereby the Bankrupt was to turn in certain furniture to the Appellant and be allowed approximately \$800 on the purchase of approximately \$3,000 worth of new furniture [T. R. pp. 43-44], and to pay the remaining balance of the purchase price of approximately \$2,300 to the Appellant at \$100 monthly [T. R. p. 45], the testimony regarding the agreement of June 23, 1953, being in direct conflict. [T. R. as a whole.] At the time of the delivery of the said furniture, certain invoices and/or delivery receipts were presented to the Bankrupt and/or his employees and the Bankrupt signed certain of these documents and certain employees of the bankrupt signed others. [Pet. Ex. 1.] The said invoices and/or delivery receipts contained an insertion at the bottom of each of such documents which read as follows:

“It is agreed that the purchaser shall pay \$.....
on execution of this agreement and the sum of \$.....
on each....., commencing.

The purchaser and/or lessee agrees that title to merchandise listed herewith, shall remain in Gold Desk & Safe Co. until entire purchase price has been paid and purchaser and/or lessee, agree to permit removal of same, with or without process of law, if not paid for within time stipulated, and to pay any and all expenses of collection or removal of said merchandise including a reasonable attorney fee. It is further understood that any sums paid on account prior to any repossession of above listed merchandise shall be as and for liquidated damages. At the option

of the seller, upon default of any single payment, the said seller may declare the entire balance due, and sue for the purchase price thereof. Time is of the essence of this agreement.

The above goods received in good order.

.....
Buyer.

Signed.....

By.....”

and none of the blank spaces therein relating to down payment, to periodic payments and the dates of such periodic payments were filled in. Testimony of the Appellant was to the effect that the identical type invoice and/or sales receipt were used in his business in both cash sales and credit sales and that the identical language was contained on all of his invoices and/or delivery receipts. [T. R. p. 62.] Testimony of the Appellant also discloses that the identical language was used in both delivery receipts and/or invoices used by the business of the Appellant. [T. R. pp. 58-62.] Testimony of the Bankrupt was to the effect that the Appellant told him that the invoices and/or delivery receipts were just a receipt—an acknowledgment of receipt. [T. R. p. 47.]

Testimony of the Appellant was to the effect that the Bankrupt made three payments upon the furniture, that the said payments were not entered as rental figures and that the said payments were credited to an open account. [T. R. pp. 58, 68-70; Appellee's Ex. 2.] Testimony of the Bankrupt was to the effect that he made three pay-

ments, insisted upon invoices and that he marked the checks "on account." [T. R. p. 45.]

There is a conflict in evidence as to whether or not there was any oral agreement as to title retention, the Appellant testifying that there was and the Bankrupt denying that it was ever discussed. [T. R. p. 45.]

Issues Involved.

The Specification of Errors upon which Appellant relies being argumentative and in the nature of argument and the issues involved as stated in the Appellant's Brief, page 7, in the Appellee's opinion failing to fairly present the issues, the Appellee is of the opinion that the following are the issues involved upon which the Appellant and the Appellee have diametrically opposed opinions.

A. Whether or not the invoices and/or delivery receipts constituted contracts.

B. Whether or not the furniture herein involved was sold on open account.

C. Whether or not an oral contract whereby Appellant was to retain title to the property in question was ever consummated.

ARGUMENT.

I.

The Delivery Receipts and/or Invoices Did Not Constitute a Contract.

That spaces in the delivery receipts and/or invoices were left blank and that the delivery receipts and/or invoices were completely silent as to the sum to be paid upon the execution of the alleged agreements, the exact amount of each periodic payment, the dates upon which periodic payments were to be made, and the date upon which periodic payments were to commence, is undisputed. [Appellant's Br. p. 4; Referee's Find. of Fact V and VI, T. R. pp. 21-22.]

An agreement to be enforceable must comprise all the terms which the parties intend to introduce into it. (*Avalon Products v. Lentini*, 98 Cal. App. 2d 177 at 180 (1950).)

A writing is incomplete as an agreement where blanks as to essential matters are left therein. (*Patterson v. Clifford R. Reed, Inc.*, 132 Cal. App. 454, 23 P. 2d 35 (1933).)

It is essential to the validity of a contract that parties should have consented to the same subject matter in the same sense, and to be final, the agreement must extend to all terms which the parties intend to introduce, and material terms cannot be left for future settlement. (*Hale v. Dollie Vardon Lumber Company*, 104 A. C. A. 908.)

Standing alone an invoice is not regarded as evidence of title nor is it a bill of sale or evidence of a sale nor does it transfer title. (*Universal Credit Company v. M. C. Gale, Inc.*, 40 Cal. App. 2d 796 at 800 (1940).)

That the parties did not intend the delivery receipts and/or invoices to constitute a contract is apparent from the record as a whole and in particular from the following facts: Even the Appellant admitted that there was no written contract during his argument at the hearing of February 26, 1954, at which time Mr. Lubin, one of the attorneys for the Appellant, stated "The entire transaction is not in the contract. There is no contract; that is, no contract except verbal, and it was agreed the title should remain in Gold." [T. R. pp. 30-31.] At the same hearing, the Appellant testified "He agreed to pay \$100 a month until the entire purchase price of the furniture was paid, which was to be determined at the time we completed his office." [T. R. p. 32.] On March 17, 1954, the Bankrupt testified as follows: "* * * I asked Mr. Gold how come there was no price entered in it. It was at that time he told me we have to set down and just go over the exact invoices and so forth, but in the meantime that this was just a receipt of—an acknowledgment of receipt." On March 19, 1954, the Appellant testified that his business used the same form of alleged agreement and entitled the same either invoice or delivery receipt without discrimination [T. R. pp. 58-62] and that the same identical form was used in his business in cash or credit sales without distinction. [T. R. p. 62.] On the same date the Appellant testified that payments made by the Bankrupt were applied on the books of his business indiscriminately to an open account containing a prior balance [T. R. pp. 67-71] and the books and records of the Appellant's business reflect that pay-

ments were credits to an open account. [Pet. Ex. 2.] On March 17, 1954, the Bankrupt testified, referring to statements of Appellant, 'Well, send \$100.00 in. You owe in excess of that anyway, so let that apply on account.' [T. R. p. 52.]

In short, the record is replete with testimony and evidence that the parties did not intend the invoices or delivery receipts to constitute a contract and inasmuch as the same was not intended as a contract how can it be contended that the same was a title retention agreement?

II.

No Oral Contract Whereby Appellant Was to Retain Title Was Ever Entered Into by the Parties.

Whether a sale is conditional or absolute is a matter to be determined from the intention of the parties as disclosed by the sale contract. (*Hannin v. Fisher*, 5 Cal. App. 2d 673 (1929); *Perkins v. Mettler*, 126 Cal. 100, 58 Pac. 384.) In determining whether or not title passes, the intention of the parties must be gathered from their words, actions and conduct and the statutory definition of intention must be applied. (Cal. Civ. Code, Sec. 1738; *Nead v. Specimen Hill*, 52 Cal. App. 2d 475 (1942).) In the absence of a written contract, such intent should be determined from the declarations and the conduct of the respective parties and the surrounding circumstances. (*Nead v. Specimen Hill*, 52 Cal. App. 2d 475.)

The testimony regarding an oral agreement to retain title is in direct conflict, the Appellant testifying that it was orally agreed that title should be retained in him and that no price was agreed to and that this was to be a lease agreement, the Bankrupt testifying directly the opposite that a trade-in allowance was agreed to, that a

difference between the trade-in and the total price was agreed to as approximately \$2,300, that he made payments marked "on account" and that at no time did the Appellant make any statements that this was a leasing arrangement or a conditional sales contract. [T. R. pp. 43-46.] The Bankrupt further testified that the Appellant stated that he was not going to put the contract through financing, that he would not be charged any interest, and that there would be no banks involved. [T. R. p. 51.]

The testimony of Appellant was inconsistent and the following facts were brought to light. That payments made by the Bankrupt were credited to an open account. That the Appellant in his business used the same type delivery receipt and/or invoice in his cash and credit or title retention transactions. That the Appellant told the Bankrupt to send in payments on account. That the Appellant had done prior business with the Bankrupt and had credited payments indiscriminately to the prior open account and to the purchase in question herein.

It is therefore clear that the Trial Court decided the nature of the oral contract for the purchase of the property involved upon conflicting evidence, both oral and documentary (see above argument relating to delivery receipts and/or invoices and references to specific quotes therein) and that there was adequate evidence in the record to support his Finding of Fact No. IX that there was no agreement between the Petitioner and the Bankrupt by which title to the personal property in question was to be retained by said Petitioner [Finding of Fact

No. IX, T. R. p. 22; Conclusion of Law No. II]; that there is no contract in existence by which title was retained through the personal property in question by the Petitioner. [T. R. p. 23.]

III.

The Said Personal Property Was Sold on Open Account and the Intention of the Parties Was That Title Pass.

As shown by the above set forth testimony of the Bankrupt, at the time of the original meeting of the parties the terms of a purported sale were clearly entered into insofar as the transfer of title was concerned, the Appellant making clear statements that there were to be no banks, no interest, etc., the price according to the above set forth testimony of the Bankrupt was clearly determined, including the amount of monthly payments and the trade-in allowance. The testimony of the Bankrupt was further buttressed by the fact that his payments were marked "on account." [T. R. p. 45; Pet. Ex. 3.] The payments were entered on an open account [Pet. Ex. 2] and testimony of Appellant reflects that payments were credited indiscriminately to an open account. [T. R. pp. 68-71.] There is no conflict that the furniture was delivered to the Bankrupt.

In determining whether or not title passes, the intention of the parties must be gathered from their words, actions and conduct and in the absence of a written contract such intention should be determined from the declaration, the conduct of the respective parties and sur-

rounding circumstances. (*Nead v. Specimen Hill*, 52 Cal. App. 2d 475.) The Uniform Sales Act and Section 1739 of the California Civil Code relating to the rules for ascertaining intention as to when property and specific goods passes states as follows:

“Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

“Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed. * * *” (Cal. Civ. Code, Sec. 1739.)

Conclusion.

We respectfully submit that the entire argument of the Appellant is based upon the premise that the testimony of the Appellant alone should be accepted as true and that the Findings of Fact of the Referee numbered VIII, IX and X are in error [T. R. p. 22] and that the Finding of Fact necessarily contained therein to the effect that the testimony of the Bankrupt is true and the testimony of the Appellant is false should be reversed and the case decided upon the facts as the Appellant sees them. Such is not the case, as the Trial Court and the District Court both had an opportunity to weigh conflicting evidence upon the issues which were decided and decided the same in favor of the Appellee.

An examination of the cases and statutes cited by the Appellant will disclose that they relate solely to the facts as seen by the Appellant and do not relate to the facts as found by the Trial Court and District Court.

We therefore respectfully submit that no error has been shown on the part of this Appellant and that the Order of the District Court in this proceeding should be affirmed.

Respectfully submitted,

CRAIG, WELLER & LAUGHRAN,

By WILLIAM E. BARTLEY,

Attorneys for Appellee.

FRANK C. WELLER,

HUBERT F. LAUGHRAN,

THOMAS S. TOBIN,

C. E. H. McDONNELL,

WILLIAM E. BARTLEY,

ANDREW F. LEONI.

United States Court of Appeals
For the Ninth Circuit

LOUIS GOLD, doing business as the
GOLD DESK AND SAFE COMPANY,
Appellant,

vs.

H. M. GERSON, Trustee in Bankruptcy
of the Estate of ROBERT STEIN-
BERG, doing business as PACIFIC
LITHO-ART COMPANY, AMALGA-
MATED CREDITORS EXCHANGE
and JERRY'S MARKET, Bankrupt,
Appellee.

Appellant's Reply Brief

ALFRED LUBIN and
MARSHALL ABBOTT
215 South LaCienega Boulevard
Beverly Hills, California
CRestview 6-9264
Attorneys for Appellant.

FILED

APR 14 1955

PAUL P. O'BRIEN, CLERK

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United States Court of Appeals

For the Ninth Circuit

LOUIS GOLD, doing business as the
GOLD DESK AND SAFE COMPANY,
Appellant

vs.

H. M. GERSON, Trustee in Bankruptcy
of the Estate of ROBERT STEIN-
BERG, doing business as PACIFIC
LITHO-ART COMPANY, AMALGA-
MATED CREDITORS EXCHANGE
and JERRY'S MARKET, Bankrupt,
Appellee.

No. 14584

Appellant's Reply Brief

I.

**THE THREE \$100 PAYMENTS RECEIVED BY THE
APPELLANT WERE NOT CREDITED TO THE
OPEN CHARGE ACCOUNT OF THE BANK-
RUPT.**

It seems, from Appellee's brief, that his entire case is built around the cry that the \$300.00 paid by the Bankrupt was credited to an open account. On pages

2, 5, 9, 10, and 11 of Appellee's brief, it is stated that the Appellant's testimony indicates that the payments were credited to an open account. *This is untrue.* It is true that at the time of the purchase of the personal property in question, the Bankrupt had an open charge account with the Appellant, on which there remained a balance of \$159.00 (transcript record p. 69). There was no entry on the books of the purchases involved in this action; nor was there any entry of the trade-in credit for the bankrupt's old furniture (Appellant's Exh. 2). No statements were sent to the Bankrupt on this particular deal (transcript record p. 70). The three \$100.00 payments received by the Appellant could not have been credited to something that had not been charged on the books. Under no possible stretch of the imagination can it be said that said payments were credited to the Bankrupt's open charge account (transcript record p. 68).

The checks sent by the Bankrupt were marked "on account". *This does not mean the open charge account*, as has been implied by Appellee. It was to be applied on account of the specific purchase of the personal property in question (transcript record p. 52). The book transaction has a simple explanation. The checks were recorded on the books to be credited to this particular purchase when the prices and the correct charges would be ascertained (transcript record p. 68). The fact that the checks may have been marked "on account", does not prove that the purchase was on an open charge account, wherein title would pass to the buyer.

The testimony of the Bankrupt discloses that the furniture was purchased on the basis of extended payments at the rate of \$100.00 per month (transcript record p. 45), and that he marked the checks "on account". There is not one iota of evidence in the record that substantiates Appellee's contention that the purchase so made was on an open charge account, and not on the extended payment plan. If such contention was the fact, the bill would have been due and payable in 30, 60 or 90 days, which is the general rule in open charge accounts.

II.

SAID PERSONAL PROPERTY WAS NOT SOLD ON OPEN ACCOUNT, AND IT WAS THE IN- TENTION OF THE PARTIES THAT TITLE SHOULD NOT PASS TO BUYER.

On page 11 of Appellee's brief, he raises the point that the furniture in question was sold on open account, and that the intention of the parties was that title should pass to the Bankrupt. He further states that the terms of the sale were clearly entered into insofar as the price and the transfer of title were concerned.

On these statements there is no reference to the transcript of record. Why has counsel for Appellee failed to make such a reference? *Because there is no evidence in the record to substantiate these bizarre allegations.*

According to the bankrupt's own testimony, there was no definite purchase prices mentioned at the time

of the delivery of the merchandise (transcript record p. 51). The parties were to get together at a later date to determine the exact amount of the purchase price, the amount of the trade-in allowance and the preparation of the necessary papers (transcript record p. 52). During the pendency of these and other adjustments, the bankrupt agreed to send in \$100.00 (transcript record p. 52).

To contend that here was an unconditional contract to sell specific goods, passing title to the buyer, is an absurdity.

III.

THE INVOICES AS EXECUTED BY THE BANKRUPT, CONSTITUTED A TITLE RETENTION AGREEMENT.

The fact that the same invoices may be used as delivery receipts and invoices by the Appellant for cash and credit sales, has no bearing on the issues of this case. We admit that an invoice, standing alone, does not constitute a contract. Appellee seems or wants to lose sight of the fact that what we have here are three separate writings contained on one document, to-wit:

1. An invoice of the merchandise delivered.
2. A receipt for the merchandise so delivered and signed by the Bankrupt.
3. An agreement that title to the merchandise shall be retained by the seller until the full purchase price shall have been paid, which was also signed by the Bankrupt.

The fact that the spaces relating to down payments, monthly payments and the due dates were blank, does not affect the agreement that title shall remain in the seller until he shall have been paid in full for his merchandise.

When the Bankrupt signed the documents, he knew that there were blank spaces which were to be filled in when the prices, terms and other adjustments were ascertained.

It has been laid down generally that if one signs an instrument containing blank spaces, he intends them to be filled in by the person to whom it is delivered, and it is ordinarily presumed to give authority to the holder to fill in the blanks in accordance with the general character of the instrument.

6 Cal. Jur. p. 227;

13 Corp. Jur. p. 308;

Thomas vs. Fursman, 39 Cal. App. 278, 280;

Pacific Auto Exch. vs. Stansfield, 62 Cal. App. 577, 579;

Jenkins vs. Johnson, 175 Mo. App. 355; 162 S. W. 308.

By means of incompetent evidence, which was objected to by Appellant's counsel (objection overruled by Referee), the Appellee seeks to infer that the invoice was just a receipt—an acknowledgment of receipt (transcript record p. 47). Insofar as the title retention clause is concerned, this was a mere attempt to alter the terms of a written instrument.

Counsel for Appellee cites the case of *Avalon Products vs. Lentini*, 98 Cal. App. 2d, 177, 180, which holds that where the price of the commodity called for, but not delivered, is to be subsequently ascertained by the parties, the sale is incomplete and unenforceable until the price is fixed or agreed upon. Under this case, the bankrupt could not possibly get title to the goods, and the seller would thereby be entitled to possession of same. One cannot blow "hot and cold" at the same time.

Patterson vs. Reed, 132 Cal. App. 454, cited by Appellee is nowhere near in point. In that case the Court held that the purported agreement of sale was not a contract as the plaintiff never accepted the offer of the defendant.

We have no quarrel with the other cases cited in Appellee's brief. They do not decide any of the pertinent issues in this case.

It is therefore clear that the Trial Court failed to consider the title retention clause on the invoice in deciding this case. Certainly, there was no adequate evidence in the record to support his Finding of Fact No. IX, that there was no agreement between the Petitioner and the Bankrupt by which title to the personal property was to be retained by said Petitioner (transcript record p. 22); and his Conclusion of Law No. II, that there is no contract in existence by which title was retained through the personal property in question by the Petitioner (transcript record p. 23).

We therefore respectfully submit that in light of the errors pointed out in our opening brief and in this reply brief, the Order of the District Court in this proceeding should be reversed.

Respectfully submitted,

ALFRED LUBIN

and

MARSHALL ABBOTT

Attorneys for Appellant.

United States
Court of Appeals
for the Ninth Circuit

FINTON J. PHELAN, JR., and E. R. CRAIN,
Appellants,
vs.

RICHARD TAITANO and HARRY L. MAN-
GERICH,
Appellees.

Supplemental
Transcript of Record

Appeal from the District Court of Guam
Territory of Guam.

FILED

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No. 14585

United States
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FINTON J. PHELAN, JR., and E. R. CRAIN,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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District Court of Guam, in and for
the Territory of Guam

Civil Case No. 69-54

FINTON J. PHELAN, JR., and E. R. CRAIN,
Plaintiffs,

vs.

RICHARD TAITANO and HARRY L. MAN-
GERICH,
Defendants.

NOTICE OF MOTION

To Finton J. Phelan, Jr., and E. R. Crain, Plain-
tiffs:

Please take notice that the motion of the defend-
ants for dismissal and summary judgment filed
November 12, 1954, in the within case, copy of which
is attached, will be brought on for hearing before
the court in the courtroom, Congress Building,
Agana, Guam, on Friday, November 26, 1954, at
9:30 a.m., or as soon thereafter as counsel can be
heard.

Dated November 12th, 1954.

Attorneys for Defendants:

/s/ HOWARD D. PORTER,
Attorney General;

/s/ LOUIS A. OTTO, JR.,
Deputy Attorney General;

/s/ LEON D. FLORES,
Island Attorney;

/s/ RICHARD ROSENBERRY,
Deputy Island Attorney.

[Endorsed]: Filed November 15, 1954.

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE

Gregorio S. Babauta, being duly sworn, states that he is over the age of twenty-one (21) years, and that he has duly served a copy of the motion of the defendant filed November 12, 1954; affidavit of defendant Harry L. Mangerich in support thereof, and Notice of Motion, on the plaintiff in the within case as follows:

On plaintiff Finton J. Phelan, Jr., on November 12, 1954, by leaving copies thereof with Jell Travis, secretary, at his office, Mesa Building, Agana, Guam;

On plaintiff E. R. Crain on November 12, 1954, by personally delivering copies thereof to him at his office, Aflague Building, Agana, Guam.

/s/ GREGORIO S. BABAUTA.

Subscribed and sworn to before me this 15th day of November, 1954.

[Seal] /s/ ROLAND A. GILLETTE,
Clerk, District Court of Guam.

[Endorsed]: Filed November 15, 1954.

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE

Gregorio S. Babauta, being duly sworn, states that he is over the age of twenty-one (21) years, and that he has duly served a copy of the memorandum of the defendants, an affidavit of defendant Richard Taitano, filed November 22, 1954, and on the plaintiffs in the within case as follows:

On plaintiff Phelan on November 22, 1954, by leaving copies thereof with Mrs. Helen Phelan, Secretary, at his office, Mesa Building, Agana, Guam;

On plaintiff E. R. Crain on November 22, 1954, by personally delivering copies thereof to him at his office, Aflague Building, Agana, Guam.

/s/ GREGORIO S. BABAUTA.

Subscribed and sworn to before me this 23rd day of November, 1954.

[Seal] /s/ J. A. CRASOSTOMO,
Deputy Clerk, District Court
of Guam.

[Endorsed]: Filed November 23, 1954.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Pursuant to Rule 75 (a) of the Federal Rules of Civil Procedure, plaintiff-appellants hereby designate for inclusion in the record on appeal to the

United States Court of Appeals for the Ninth Circuit, taken by notice of appeal filed November 12, 1954, the following portions of the record and proceedings in this action:

1. The Complaint.
2. Plaintiff-Appellants' Notice of Motion and supporting affidavits.
3. Defendant-Appellees' Motion, Notice of Motion and supporting affidavits.
4. The Transcript of Proceedings at the hearing on plaintiff-appellants' motion heard on the 12th day of November, 1954.
5. The order denying plaintiff-appellants' motion for a temporary restraining order and temporary injunction.
6. Notice of Appeal.
7. This designation.
8. Journal entries.

/s/ FINTON J. PHELAN, JR.,
In Propria Persona;

/s/ E. R. CRAIN,
In Propria Persona.

Service of copy acknowledged.

[Endorsed]: Filed November 18, 1954.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

Pursuant to Rule 75 (a) of the Federal Rules of

Civil Procedure, plaintiff-appellants hereby designate for inclusion in the record on appeal to the United States Court of Appeals for the Ninth Circuit, taken by notice of appeal filed December 6, 1954, the following portions of the record and proceedings in this action:

1. All those portions of the record and proceedings in this cause previously designated in the designation of contents of record on appeal filed with this Court November 18, 1954, being No. 14585 in the United States Court of Appeals for the Ninth Circuit.

2. Memorandum of points and authorities in support of defendants' motion for dismissal and for summary judgment filed November 22, 1954.

3. Affidavit of Richard Taitano in support of motion filed November 22, 1954.

4. Transcript of proceedings had on November 26, 1954.

5. Order of dismissal dated November 30, 1954.

6. Notice of appeal filed December 6, 1954.

7. This designation.

8. Journal entries.

9. All other documents filed in this cause.

/s/ FINTON J. PHELAN, JR.;

/s/ E. R. CRAIN.

[Endorsed]: Filed December 21, 1954.

[Endorsed]: No. 14585. United States Court of Appeals for the Ninth Circuit. Finton J. Phelan, Jr., and E. R. Crain, Appellants, vs. Richard Taitano and Harry L. Mangerich, Appellees. Supplemental Transcript of Record. Appeal From the District Court of Guam, Territory of Guam.

Filed January 14, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

No. 14,585

IN THE

United States Court of Appeals
For the Ninth Circuit

FINTON J. PHELAN, JR., and
E. R. CRAIN,

Appellants,

VS.

RICHARD TAITANO, and
HARRY L. MANGERICH,

Appellees.

On Appeal from the District Court of Guam for the
Unincorporated Territory of Guam.

APPELLANTS' OPENING BRIEF.

FINTON J. PHELAN, JR.,
Suite 201-203, Mesa Building,
First Street West, Agana, Guam,

E. R. CRAIN,
Suite 101, Aflague Building,
Agana, Guam,

Pro se.

FILED

MAY 12 1955

PAUL P. O'BRIEN, CLERK

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No. 14,585

IN THE
United States Court of Appeals
For the Ninth Circuit

FINTON J. PHELAN, JR., and
E. R. CRAIN,

Appellants,

vs.

RICHARD TAITANO, and
HARRY L. MANGERICH,

Appellees.

**On Appeal from the District Court of Guam for the
Unincorporated Territory of Guam.**

APPELLANTS' OPENING BRIEF.

JURISDICTION.

Two appeals in the same cause are herein combined, both being taken from the District Court of Guam; the first appeal having been noticed on the 12th day of November, 1954, from the order of the District Court of Guam denying appellants' motion for a preliminary and temporary injunction entered on the 12th day of November, 1954; the second appeal was noticed on the 6th day of December, 1954, from the order of the District Court of Guam entered on the 30th day of November, 1954, dismissing the complaint for want of jurisdiction over the subject matter.

This Court has jurisdiction of this appeal by virtue of the provisions of Title 28 U.S.C.A. Section 41; 1291; 1292; 1340.

ISSUES PRESENTED HEREIN.

1. Did the Court have jurisdiction of the subject matter of this cause?

2. Did the Court abuse its discretion by refusing to grant the temporary restraining order and injunction; by holding itself to be without jurisdiction to restrain the acts of the defendants; and by holding that plaintiffs must submit to defendants' demands as a condition precedent to seeking relief?

3. Was the Court biased in ignoring the Constitutional questions before it in this cause?

4. Was the Court in error in relying upon alleged facts not properly before it; in accepting defendants' affidavits as proof of statements therein contained; and ruling upon such facts that defendants are proper officers to collect a territorial income tax thereby denying to plaintiffs the opportunity to show otherwise?

5. Was the Court in error in holding that there did exist adequate administrative procedures, remedies and safeguards for the protection of plaintiffs' rights?

6. Did the Court err in failing to take judicial notice of the laws of the United States and of Guam and assuming that the existence of the alleged territorial income tax is a fact established beyond the need of proof?

7. Can public officials shield acts in excess of statutory authority behind the cloak of their office?

8. Was the Court in error in not excluding an affidavit served upon plaintiffs in violation of rule 56?

9. Did the Court err in failing to take judicial notice of the provisions of Title 38 U. S. C. A. and of Section 690 (13) of the Code of Civil Procedure of Guam?

10. Can the Court assume jurisdiction of a cause already on appeal?

11. Did the Court err in permitting laymen not admitted to practice before it to represent the defendants?

12. It is the further contention of Appellants that they were erroneously precluded by Court from demonstrating to the Court and for the record the following points supporting the allegations contained in the complaint:

(a) An assumed delegation of the legislative powers of the Congress contrary to the Constitution and laws of the United States.

(b) The usurpation of the powers reserved to the Congress to levy and collect taxes.

(c) Defendants' violations of the provisions of the fourth and fifth amendments to the Constitution of the United States.

(d) Denial of the equal protection of the laws and due process of law both to the plaintiffs and their clients and the irreparable harm to plaintiffs and others.

(e) That Chapter 8A, Title 48 U. S. C. A., as interpreted by defendants:

1. Is repugnant to the Constitution and laws of the United States.

2. Contains no standards.
 3. Is indefinite and uncertain.
 4. Is vague and ambiguous.
 5. Contains no grant of authority or power.
 6. Violates the precepts of statutory construction established by the Supreme Court of the United States.
- (f) Violations of the Bill of Rights of Guam.
-

STATEMENT OF THE CASE.

Appellants are citizens of the United States, permanently residing within the unincorporated territory of Guam, members of the Bar and engaged in the private practice of the Law. Since January first, 1953, appellants have maintained separate offices and prior to that, for a period of two years, they practiced as partners.

In 1950, the United States Congress enacted a Statute commonly known as the Organic Act of Guam. This act erected the present civil government for this possession, replacing the previous Naval Government existing by virtue of a Presidential Executive Order.

The Organic Act of Guam unfortunately contained, as enacted, many ambiguities both patent and latent, the resolution of which undoubtedly will, as it has already, entail much litigation over the constructions of this Act. The present action is one such case, involving not only the construction of a major portion of that Act but collaterally many points of far reaching importance within the unincorporated territory of Guam affecting not only its citizens

but also its business community. This action is not a tax case, but is essentially one of Statutory construction and Constitutional law and principles.

Officials of the Government of Guam, as well as officers of the Department of the Interior, have interpreted administratively the provisions of the Organic Act of Guam with respect to income taxes and have sought to implement their interpretation by executive action rather than by the action of the legislative branch of either the United States or of Guam.

They have construed to exist a statute patterned after Title 26 U.S.C.A., though indefinite as to whether a statute of the United States or of Guam; to create a semblance of the Bureau of Internal Revenue, assuming the powers, authorities, and duties of the various officers of the Federal Bureau under the claimed authority of the Governor of Guam to erect such; claimed the right and power to construe, alter, change and amend the text by administrative action, and have never published the text of the law as changed and altered or published the claimed changes.

It has been impossible to find, anywhere, the changes, additions, substitutions or deletions in the text of Title 26 U.S.C.A. claimed by these officials to have been made resulting in a tax statute, if such it be, of such flexibility, vagueness and indefiniteness that its limits cannot be determined or described.

It is in the light of such circumstances that the present action arose. Appellants after the passage of the Organic Act of Guam devoted considerable study to the problem herein of concern and endeavored to find the correct con-

struction and solution of the problem and the numerous other grave problems which of necessity are closely related thereto.

Officials of the Government of Guam claiming, though without any local statute authorizing or empowering them to so act, these powers and authorities constituted themselves as a local Bureau of Internal Revenue and have, without any attempt to legitimize their position, proceeded to enforce, administer and collect, taxes, including the imposition of penalties and the exercise of various summary procedures.

The position of appellants being that if the Statute is Title 26 U.S.C.A., only the Commissioner of Internal Revenue and his authorized delegates possess such powers and all others are interlopers; if it is a local Statute, no such officers exist within the Government of Guam and these defendants are acting without any color of Law and in want of any authority. That in any event as construed by appellants and their masters the Organic Act of Guam is vague, uncertain, ambiguous, and lacking either standards or certainty. That therefore many Constitutional vices at once rise following the attempted construction of the Organic Act as claimed by appellants.

Seeking to determine definitely the existence or non-existence of a territorial tax as claimed, its exact text if any, the officers who are charged with the responsibility to administer such law and the extent of and limits of the authority of local officers, appellants, who report monthly their entire gross income to the Government of Guam, have contested the right of these individuals to enforce the Income Tax Laws of the United States and have attempted to secure a

determination of the respective rights of all parties. Rather than make available to anyone the text of the Statute being enforced and using such portions of the Business Privilege Tax Law of Guam as may be convenient in connection with portions of Title 26 U.S.C.A., these officials have proceeded to seize funds deposited in the bank by appellants, file purported liens, and otherwise attempt to coerce appellants to submit to their illegal and unauthorized demands.

Appellants accordingly, to protect their rights and to protect the rights of their numerous and various clients, filed this action questioning the authority of these appellees, seeking the vindication of their constitutional rights, the recovery of their property confiscated illegally, the preservation of their civil rights now being threatened, that appellees be restrained from their attempted illegal actions and that appellant Phelan recover the sums of money confiscated from him contrary to the Provisions of Section 454a of Title 38 U.S.C.A. and Section 690 (13) of the Code of Civil Procedure of Guam. Appellants brought this action in the District Court of Guam on the 8th day of November, 1954. A motion for a preliminary injunction was noticed by appellants and upon a hearing on the 12th day of November, 1954, said injunction was denied. Appellants thereupon noticed an appeal to this Court on the 12th day of November, 1954. Appellees filed their motion to dismiss, for summary judgment and to dismiss for lack of jurisdiction over the subject matter. No notice of motion was served upon appellants, though they were orally informed at the hearing of November 12th. A hearing was had upon appellee's motion on the 26th day of November, 1954, and, pursuant to the order of the court, an order of dismissal

was entered on the 30th day of November. Appellants noticed an appeal from this order on the 6th day of December, 1954. Pursuant to a motion for consolidation made by appellants, this court by order of 3 January, 1955, consolidated these appeals.

ISSUES PRESENTED HEREIN.

1. Was the Court in error:

(a) In denying it had jurisdiction of the subject matter; thereafter assuming jurisdiction after an appeal was taken?

(b) In holding that it could not issue an injunction or restraining order until plaintiffs had submitted to defendants' demands?

2. The Court erroneously relied upon alleged facts not before it; accepted an affidavit of defendants as proof of its contents; accepted said affidavit containing hearsay contrary to rule 56; and held without proof that defendants are the proper officers to collect income tax, thus holding by implication the existence of adequate procedures, remedies and safeguards.

3. Can public officials shield their acts in excess of statutory authority behind the cloak of their office?

4. The Court erred in interpreting statutes of the United States and assuming by implication that they had become statutes of Guam.

5. The Court erred in failing to take judicial notice of the provisions of Title 38, Section 454A, U. S. C. A. and of Section 690 (13) of the Code of Civil Procedure of Guam.

6. The Court was in error in permitting laymen not admitted to practice before it to represent the defendants.

It is the further contention of Appellants that they were erroneously deprived by the Court of their day in court and from demonstrating the following major points raised by the allegations contained in the complaint:

(a) The Court was biased in ignoring the Constitutional questions before it in this cause.

(b) An illegal assumption of the legislative powers of the Congress by defendants in violation of the Constitution of the United States and the usurpation of the powers reserved to the Congress to levy and collect taxes.

(c) Defendants' violations of the provisions of the fourth and fifth amendments to the Constitution of the United States.

(d) Denial of the equal protection of the laws and due process of law both to the plaintiffs and their clients and the irreparable harm to plaintiffs and others.

(e) That Chapter 8 A, Title 48, Section 1421i, U. S. C. A., as interpreted by defendants:

1. Is repugnant to the Constitution and laws of the United States.

2. Contains no standards.

3. Is indefinite and uncertain.

4. Is vague and ambiguous.

5. Contains no grant of authority or power.

6. Violates the precepts of statutory construction established by the Supreme Court of the United States.

(f) Violations of the Bill of Rights of Guam.

STATUTES AND RULES INVOLVED.

Constitution

Article I Section 1:

“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”

Section 8:

“The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; . . .”

Article IV Section 3:

“ . . . The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.”

Article VI:

“ . . . This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. . . .”

Amendment IV:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describ-

ing the place to be searched, and the persons or things to be seized.”

Amendment V:

“No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

Title 26 U.S.C.A.

Section 53:

“(b) To Whom return made. (1) Individuals. Returns (other than corporation returns) shall be made to the collector for the district in which is located the legal residence or principal place of business of the person making the return, or, if he has no legal residence or principal place of business in the United States, then to the collector at Baltimore, Maryland.

“(2) Corporations. Returns of corporations shall be made to the collector of the district in which is located the principal place of business or principal office or agency of the corporation, or, if it has no principal place of business or principal office or agency in the United States, then to the collector at Baltimore, Maryland. 53 Stat. 28.”

Section 62. Rules and Regulations:

“The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this chapter. 53 Stat. 32.”

Section 251. Income from sources within possessions of United States:

“(a) General rule. In the case of citizens of the United States or domestic corporations, satisfying the following conditions, gross income means only gross income from sources within the United States—

“(1) If 80 per centum or more of the gross income of such citizen or domestic corporation (computed without the benefit of this section), for the three-year period immediately preceding the close of the taxable year (or for such part of such period immediately preceding the close of such taxable year as may be applicable) was derived from sources within a possession of the United States; and

“(2) If, in the case of such corporation, 50 per centum or more of its gross income (computed without the benefit of this section) for such period or such part thereof was derived from the active conduct of a trade or business within a possession of the United States; or

“(3) If, in case of such citizen, 50 per centum or more of his gross income (computed without the benefit of this section) for such period or such part thereof was derived from the active conduct of a trade or business within a possession of the United States; either on his own account or as an employee or agent of another. . . .”

“(d) Definition. As used in this section the term ‘possession’ of the United States does not include the Virgin Islands of the United States and such term when used with respect to citizens of the United States does not include Puerto Rico. . . . (j) Employees of United States. For the purposes of this section, amounts paid for services performed by a citizen of the United States as an employee of the United States or any agency thereof shall be deemed to be derived from sources within the United States. As amended Nov. 8, 1945, 5:17 P.M., E.S.T., c. 453, Title I, § 102(b) (9),

59 Stat. 559; Aug. 1, 1947, c. 430, § 1, 61 Stat. 714; Sept. 23, 1950; 3:15 p.m., E.D.T., c. 994, Title II, §§ 220, 221 (a), 64 Stat. 944.”

Section 272. Procedure in general:

((a) (1) Petition to the Tax Court of the United States.) “If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with the Tax Court of the United States for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. . . .”

Section 272. Jeopardy assessments:

“(a) Authority for making. If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.”

Section 291. Failure to file return:

“(a) In case of any failure to make and file return required by this chapter, within the time prescribed by

law or prescribed by the Commissioner in pursuance of law, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the tax: . . .”

Section 1101. Jurisdiction:

“The Tax Court and its divisions shall have such jurisdiction as is conferred on them by chapters 1, 2, 3, and 4 of this title, by Title II and Title III of the Revenue Act of 1926, 44 Stat. 9, or by laws enacted subsequent to February 26, 1926. 53 Stat. 158, amended Oct. 21, 1942, 4:30 p.m., E.W.T., c. 619, Title V, § 504 (a), 56 Stat. 957.”

Section 1600. Rate of tax:

“Every employer (as defined in Section 1607 (a)) shall pay for the calendar year 1939 and for each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3 per centum of the total wages (as defined in section 1607 (b)) paid by him during the calendar year with respect to employment (as defined in section 1607 (c)) after December 31, 1938. 53 Stat. 183, as amended Aug. 10, 1939, c. 666, Title VI, § 608, 53 Stat. 1387.”

Section 1605. Payment of taxes:

“(a) Administration. The tax imposed by this subchapter shall be collected by the Bureau of Internal Revenue under the direction of the Secretary and shall be paid into the Treasury as internal-revenue collections.”

Section 1621. Definitions:

“... (a) Wages. The term ‘wages’ means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include remuneration paid—

“... (8) (A) for services for an employer (other than the United States or any agency thereof) performed by a citizen of the United States, if it is reasonable to believe that during the entire calendar year the employee will be a bona fide resident of a foreign country or countries, or ...

“(8) (B) for services for an employer (other than the United States or any agency thereof) performed by a citizen of the United States within a possession of the United States (other than Puerto Rico), if it is reasonable to believe that at least 80 per centum of the remuneration to be paid to the employee by such employer during the calendar year will be for such services, or ...”

Section 3612. Returns executed by Commissioner or Collector:

“(a) Authority of collector. If any person fails to make and file a return or list at the time prescribed by law or by regulation made under authority of law, or makes, willfully or otherwise, a false or fraudulent return or list, the collector or deputy collector shall make the return or list from his own knowledge and from such information as he can obtain through testimony or otherwise;

“(b) Authority of Commissioner. In any such case the Commissioner may, from his own knowledge and from such information as he can obtain through testimony or otherwise;

“(1) To make return. Make a return, or

“(2) To amend Collector's return. Amend any return made by a collector or deputy collector.

“(c) Legal status of returns. Any return or list so made and subscribed by the Commissioner, or by a collector or deputy collector and approved by the Commissioner, shall be prima facie good and sufficient for all legal purposes.

“(d) Additions to tax

“(1) Failure to file return. In case of any failure to make and file a return or list within the time prescribed by law, or prescribed by the Commissioner or the collector in pursuance of law, the Commissioner shall add to the tax 25 per centum of its amount, except that when a return is filed after such time and it is shown that the failure to file it was due to a reasonable cause and not to willful neglect, no such addition shall be made to the tax: Provided, That in the case of a failure to make and file a return required by law, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, if the last date so prescribed for filing the return is after August 30, 1935, then there shall be added to the tax, in lieu of such 25 per centum: 5 per centum if the failure is for not more than 30 days, with an additional 5 per centum for each additional 30 days or fraction thereof during which failure continues, not to exceed 25 per centum in the aggregate.

“(2) Fraud. In case a false or fraudulent return or list is willfully made, the Commissioner shall add to the tax 50 per centum of its amount. . . .

“(f) Determination and assessment. The Commissioner shall determine and assess all taxes, other than stamp taxes, as to which returns or lists are so made under the provisions of this section. 53 Stat. 437.”

Section 3614. Examination of books and witnesses:

“(a) To determine liability of the taxpayer. The Commissioner for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the at-

tendance of the person rendering the return or of any officer having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons.”

Section 3640. Assessment authority:

“The Commissioner is authorized and required to make the inquiries, determinations, and assessments of all taxes and penalties imposed by this title, or accruing under any former internal revenue law, where such taxes have not been duly paid by stamp at the time and in the manner provided by law. 53 Stat. 442.”

Section 3650. Collection districts:

“(a) Establishment and alteration. For the purpose of assessing, levying, and collecting the taxes provided by the internal revenue laws, the President may establish convenient collection districts, and may from time to time alter said districts.

“(b) Number. The whole number of collection districts for the collection of internal revenue shall not exceed 65.

“(c) Boundaries

“(1) Hawaii. The Territory of Hawaii shall constitute a district for the collection of the internal revenue of the United States, with a collector, whose office shall be at Honolulu, and deputy collectors at such other places in the several islands as the Secretary shall direct.

“(2) Elsewhere. For the purpose mentioned in subsection (a), the President may subdivide any State, Territory, or the District of Columbia, or may unite two or more States or Territories into one district. 53 Stat. 445.”

Section 3670. Property subject to lien:

“If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (in-

cluding any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. 53 Stat. 448.”

Section 3671. Period of lien:

“Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time. 53 Stat. 449.

Section 3740. Authorization to commence suit:

“No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner authorizes or sanctions the proceedings and the Attorney General directs that the suit be commenced. 53 Stat. 460.”

Section 3743. Regulations:

“It shall be the duty of the Commissioner, with the approval of the Secretary, to establish such regulations, not inconsistent with law, for the observance of revenue officers, respecting suits arising under the internal revenue laws in which the United States is a party, as may be deemed necessary for the just responsibility of those officers and the prompt collection of all revenues and debts due and accruing to the United States under such laws. 53 Stat. 460.”

Section 3791. Rules and regulations:

“(a) Authorization

“(1) In general. Except as provided in section 1928 (a), Cotton Futures, section 2599, Marihuana, section 2559, Narcotics, section 3176, Liquor, and section 1805, Silver, the Commissioner, with the approval of the Secretary, shall prescribe and publish all need-

ful rules and regulations for the enforcement of this title.

“(2) In case of change in law. The Commissioner may make all such regulations, not otherwise provided for, as may have become necessary by reason of any alteration of law in relation to internal revenue.

“(b) Retroactivity of regulations or rulings. The Secretary or the Commissioner with the approval of the Secretary, may prescribe the extent, if any, to which any ruling, regulation, or Treasury Decision, relating to the internal revenue laws, shall be applied without retroactive effect. 53 Stat. 467.”

Section 3797. Definitions:

“(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof— . . .”

“(9) United States. The term ‘United States’ when used in a geographical sense includes only the States, the Territories of Alaska and Hawaii, and the District of Columbia.

“(10) State. The word ‘State’ shall be construed to include the territories and the District of Columbia, where such construction is necessary to carry out provisions of this title.

“(11) Secretary. The term ‘Secretary’ means the Secretary of the Treasury.

“(12) Commissioner. The term ‘Commissioner’ means the Commissioner of internal revenue.

“(13) Collector. The term ‘collector’ means collector of internal revenue.

“(14) Taxpayer. The term ‘taxpayer’ means any person subject to a tax imposed by this title.”

Section 3900. Appointment and Salary:

“There shall be in the Department of the Treasury a Commissioner of Internal Revenue, who shall be

appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to basic compensation at the rate of \$15,000 per annum. As amended Oct. 15, 1949, c. 695, § 5 (a), 63 Stat. 880.”

Section 3901. Powers and Duties:

“(a) Assessment and collection. The Commissioner, under the direction of the Secretary—

“(1) General superintendence. Shall have general superintendence of the assessment and collection of all taxes imposed by any law providing internal revenue; and

“(2) Regulations, forms, stamps, and dies. Shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps, and other matters pertaining to the assessment and collection of internal revenue; and shall provide hydrometers, and proper and sufficient adhesive stamps and stamps or dies for expressing and denoting the several stamp taxes, or, in the case of percentage taxes, the amount thereof; and alter and renew or replace such stamps from time to time, as occasion may require.”

Section 3941. Appointment:

“(a) In general. The President, by and with the advice and consent of the Senate, shall appoint for each collection district a collector, who shall be a resident of the same.

“(b) Consolidation of collection districts. When two or more collection districts are united by the President, he may designate from among the existing officers of such districts one collector for the new district, or, at his discretion, he may make a new appointment of such officer for said district. . . .”

Section 3967. Prohibition upon discharge of another collector's duties:

“No collector shall be detailed or authorized to discharge any duty imposed by law upon any other collector. 53 Stat. 484.”

Section 4040. Posts of duty of employees in field service or traveling:

“The Commissioner shall determine and designate the posts of duty of all employees of the internal revenue service engaged in field work or traveling on official business outside of the District of Columbia. 53 Stat. 495.”

Section 4041. Issue of instructions, regulations and forms:

“(a) In general. The Secretary shall prescribe forms of entries, oaths, bonds, and other papers, and rules and regulations, not inconsistent with law, to be used under and in the execution and enforcement of the various provisions of the internal revenue laws; and he shall give such directions to collectors and prescribe such rules and forms to be observed by them as may be necessary for the proper execution of the law. . . .”

Section 4047. Penalties:

“... (e) Other unlawful acts of revenue officers or agents. Every officer or agent appointed and acting under the authority of any revenue law of the United States—

“(1) Who is guilty of any extortion or willful oppression under color of law; or

“(2) Who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty; or

“(3) Willfully neglects to perform any of the duties enjoined on him by law; or

“(4) Who conspires or colludes with any other person to defraud the United States; or

“(5) Who makes opportunity for any person to defraud the United States; or

“(6) Who does or omits to do any act with intent to enable any other person to defraud the United States; or

“(7) Who negligently or designedly permits any violation of the law by any other person; or

“(8) Who makes or signs any false entry in any book, or makes or signs any false certificate or return, in any case where he is by law or regulation required to make any entry, certificate, or return; or

“(9) Who, having knowledge or information of the violation of any revenue law by any person, or of fraud committed by any person against the United States under any revenue law, fails to report, in writing, such knowledge or information to his next superior officer and to the Commissioner; or

“(10) Who demands, or accepts, or attempts to collect, directly or indirectly, as payment or gift, or otherwise, any sum of money or other thing of value for the compromise, adjustment, or settlement of any charge or complaint for any violation or alleged violation of law, except as expressly authorized by law so to do—

“shall be dismissed from office, shall be fined not less than \$1,000 nor more than \$5,000, and be imprisoned not less than six months nor more than three years. The court shall also render judgment against the said officer or agent for the amount of damages sustained in favor of the party injured, to be collected by execution. One half of the fine so imposed shall be for the use of the United States, and the other half for the use of the informer, who shall be ascertained by the judgment of the court. The provisions of this subsection shall apply to internal revenue agents as fully as to internal revenue officers.”

Section 4048. Extended application of penalties relating to internal revenue officers :

“All provisions of law imposing fines, penalties, or other punishment for offenses committed by an internal revenue officer or other officer of the Department of the Treasury, or under any bureau thereof, shall apply to all persons whomsoever, employed, appointed, or acting under the authority of any internal revenue law, or any revenue provision of any law of the United States, when such persons are designated or acting as officers or deputies, or persons having the custody or disposition of any public money. 53 Stat. 497.”

Title 28 U.S.C.A.

Section 1331. Federal question ; amount in controversy :

“The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.”

Section 1340. Internal revenue ; customs duties :

“The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court.”

Section 1341. Taxes by States :

“The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.”

Section 1343. Civil Rights :

“The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person :

“(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privileges of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 47 of Title 8;

“(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 47 of Title 8 which he had knowledge were about to occur and power to prevent;

“(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.”

Section 1357. Injuries under Federal laws:

“The district courts shall have original jurisdiction of any civil action commenced by any person to recover damages for any injury to his person or property on account of any act done by him, under any Act of Congress, for the protection or collection of any of the revenues, or to enforce the right of citizens of the United States to vote in any State.”

Section 2201. Creation of remedy:

“In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. As amended May 24, 1959, c. 139, § 111, 63 Stat. 105.”

Section 2202. Further relief :

“Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.”

Title 38 U.S.C.A.

Section 454a. Assignability and exempt status of payments of benefits :

“Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. Such provisions shall not attach to claims of the United States arising under such laws nor shall the exemption herein contained as to taxation extend to any property purchased in part or wholly out of such payment.

“From and after October 17, 1940, this section shall be construed to prohibit the collection by set-off or otherwise out of any benefits payable pursuant to any law administered by the Veteran's Administration and relating to veterans, their estates, or their dependents, of any claim of the United States or any agency thereof against (a) any person other than the indebted beneficiary or his estate; or (b) any beneficiary or his estate except amounts due the United States by such beneficiary or his estate by reason of overpayments or illegal payments made under such laws relating to veterans, to such beneficiary or his estate or to his dependents as such : Provided, however, That if the benefits be insurance payable by reason of yearly renewable term or of United States Government life (converted)

herein provided shall be inapplicable to indebtedness existing against the particular insurance contract upon the maturity of which the claim is based, whether such indebtedness be in the form of liens to secure unpaid premiums, or loans, or interest on such premiums or loans, or indebtedness arising from overpayments of dividends, refunds, loans, or other insurance benefits: Provided further, That nothing in this amendatory Act shall be construed to modify or repeal section 687b of this title. Aug. 12, 1935, c. 510, § 3, 49 Stat. 609; Oct. 17, 1940, c. 893, § 5, 54 Stat. 1195.”

Title 48 U.S.C.A. Bill of Rights

“... (e) No person shall be deprived of life, liberty, or property without due process of law.

“(f) Private property shall not be taken for public use without just compensation.

“... (n) No discrimination shall be made in Guam against any person on account of race, language, or religion, nor shall the equal protection of the laws be denied....”

Section 1421c:

“Certain laws continued in force; modification or repeal of laws; applicability of Acts of Congress . . .

(b) Except as otherwise provided in this chapter, no law of the United States hereafter enacted shall have any force or effect within Guam unless specifically made applicable by Act of the Congress either by reference to Guam by name or by reference to ‘possessions’.”

Section 1421h:

“Duties and taxes to constitute fund for benefit of Guam.

“All customs duties and Federal income taxes derived from Guam, the proceeds of all taxes collected insurance issued by the United States, the exemption

under the internal-revenue laws of the United States on articles produced in Guam and transported to the United States, its Territories, or possessions, or consumed in Guam, and the proceeds of any other taxes which may be levied by the Congress on the inhabitants of Guam, and all quarantine, passport, immigration, and naturalization fees collected in Guam shall be covered into the treasury of Guam and held in account for the government of Guam, and shall be expended for the benefit and government of Guam in accordance with the annual budgets. Aug. 1, 1950, c. 512, § 30, 64 Stat. 392.”

Section 1421i:

“Applicability of Federal income tax laws:

“The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam. Aug. 1, 1950, c. 512, § 31, 64 Stat. 392.”

Section 1422c:

“Executive agencies and instrumentalities — Appointment of heads; preferences in appointments and promotions; educational and vocational training; establishment of merit system

“(a) The Governor shall, except as otherwise provided in this chapter or the laws of Guam, appoint, by and with the advice and consent of the legislature, all heads of executive agencies and instrumentalities. In making appointments and promotions, preference shall be given to qualified persons of Guamanian ancestry. With a view to insuring the fullest participation by Guamanians in the government of Guam, opportunities for higher education and in-service training facilities shall be provided to qualified persons of Guamanian ancestry. The legislature shall establish a merit system and, as far as practicable, appointments and promotions shall be made in accordance with such merit system.

“Appointment and removal of officers; powers and duties of officer

“(b) The Governor may appoint or remove any officer whose appointment or removal is not otherwise provided for. All officers shall have such powers and duties as may be conferred or imposed on them by law or by executive regulation of the Governor not inconsistent with any law.”

Title 42 U.S.C.A.

Section 1981. Equal rights under the law:

“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. R. S. § 1977.”

Section 1983. Civil action for deprivation of rights:

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. § 1979.”

Section 1988. Proceedings in vindication of civil rights:

“The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in con-

formity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. R. S. § 722.”

Code of Civil Procedure of Guam

Section 690.

“Property exempt from execution or attachment. Exceptions.

“The following property is exempt from execution or attachment, except as herein otherwise specially provided: . . .

“13. All money received by any person, a resident of Guam as a pension from the United States Government, or as a pension or retirement salary from the government of Guam, whether the same shall be in the actual possession of such pensioner, or deposited or loaned by him. . . .”

SUMMARY OF ARGUMENT.

This appeal consisting of two separate appeals in the same cause has been consolidated and therefore in the interests of brevity and clarity the numerous errors claimed in the proceedings by appellants have been combined into the few but more logical points to which they properly belong. Thus, in this brief, the errors cited will not be treated as

separate points but in related groupings as logically as they fall.

Appellants claim that among the many errors contained in this proceeding the following predominate and require the reversal of the District Court of Guam and the remand of this cause for a hearing on the merits.

Clearly the District Court of Guam had jurisdiction of the subject matter of the action and equally clearly when the action and the very file was in this court, the District Court of Guam lacked jurisdiction and authority to dismiss the action. Equally clear under the facts alleged in the complaint the court erred in not granting the temporary injunction sought first. This action is not one against any Government, but against individuals for actions in excess of and in the absence of legal authority. Secondly, admitting solely for argument, that this action can be construed as against the Government of Guam, yet not a party hereto, this action clearly falls within the exception in Section 1341, Title 28 U.S.C.A. There exists no speedy, plain or efficient remedy except by action brought in the District Court of Guam.

The court erred in basing its rulings upon facts not before it, in taking an affidavit as proof of its contents rather than as provided by Rule 56—to show the lack of any substantial controverted fact—not to prove a fact in issue, in considering an affidavit not served in accordance with Rule 56 and, at that, one based upon information and belief and hearsay, in determining upon assumption and in the face of the plain text of the local statutes (not by the court considered) that the defendants are the properly authorized officers to collect income tax, proof to the contrary not being permitted and thus by implication the determination

that adequate procedures, remedies, and safeguards must exist.

The court erred in refusing to admit the difference between a public officer acting within the scope of his office and authority and an officer acting in his individual capacity beyond that scope and authority or even acting with no cloak of authority either express or implied. These appellants could not show the limits of appellees' authority and the existence of any acts outside of any authority.

The court erred gravely in distinguishing between Statutes of the United States, Statutes of Guam, and such Statutes, if any exist, as may be statutes enacted by the Congress as local Statutes of Guam. This error, so basic, resulted and will result in the future in similar confused causes. Appellants contend that Statutes of the United States must remain such except as provided by the clear command of Statute and that they cannot be transferred by implication either Executive or Judicial into local territorial Statutes and that therefore it is error to interweave certain portions of local Statutes into Title 26 U.S.C.A. and treat the local handicraft as one Statute. This has resulted in a false and erroneous concept and the mirage of a Statute combining parts of a United States Statute and certain sections of a territorial Statute, which Statute was as so assembled never enacted either by the Congress or the Guam Legislature.

It has the additional virtue of not only imposing a taxing Statute by implication and construction, but also Penal and Criminal sanction created in the same manner.

The court plainly erred in not noticing the plain provisions of Section 454a of Title 38 U.S.C.A. and Section 690

(13) of the Code of Civil Procedure of Guam. These sections are mandatory and appellants contend the court must take Judicial Notice of the Statutes of the United States and of Guam.

The court erred in permitting persons not members of the Bar to appear and represent appellees. Appellees being sued in their individual capacities are, by the Codes of Guam, not entitled to be represented at the expense of the public and all Government employees are forbidden by law to appear for private individuals. The Government of Guam is not a party to this action.

Appellants contend that the District Court of Guam plainly erred and with preconceived opinions ignored the numerous constitutional questions raised by the complaint. That such questions are not frivolous and can only be properly determined after the taking of evidence. That constitutional and questions of similar gravity cannot and should not be resolved upon a hearing upon a motion. That on a motion a court cannot determine whether or not there has been an usurpation of the Legislative Powers of the Congress or of the Legislative Power to levy taxes. Such a violation may be either a void delegation or an erroneous construction and application of a valid provision.

Likewise, the appellants contend that only upon a full disclosure of the facts and upon the reception of evidence can the court determine an infringement of the IV and V Amendments.

Appellants believe that it is only by the reception of evidence that any court can determine whether, under the facts in a particular action, there has been a denial of the Equal

Protection of the Laws and of Due Process by the defendants. The District Court erred in ignoring these questions raised and in precluding appellants from attempting to demonstrate the existence of the fact as alleged in the complaint. So also with respect to irreparable harm, and injury. In like manner the District Court of Guam disregarded the fact that this complaint also sets forth a claim for relief and allegation of fact in support thereof under the civil rights Statutes of the United States. Appellants claim this likewise constitutes reversible error.

Appellants affirm that the District Court of Guam disregarded erroneously the grave questions with respect to the legality of Section 1421i of Title 48 U.S.C.A. as interpreted and construed by the defendants. That sufficient allegations of the repugnance of this interpretation to both the Constitution and Laws of the United States are contained in the complaint. That such questions cannot be resolved and decided upon a hearing on a motion, but must be decided after authorities and evidence are before the court. The court can take Judicial Notice of the text of a Statute, but the Rule of Reason says that how an individual or many individuals construe such a section is a fact to be proven.

Thus appellants claim the court erred in not considering the allegations of the complaint with respect to repugnance to the Constitution and Laws of the United States, the vice of absence of Standards, Indefiniteness and Ambiguity; vagueness, uncertainty; lack of any grant or delegation of authority or power; the violations of the Canons of Statutory construction in the interpretation asserted.

In like manner, appellants assert that the court erred in disregarding the clear allegations of substantial violation

of the Bill of Rights of Guam contained in the Organic Act of Guam.

Therefore, appellants contend that the District Court of Guam should be reversed, the appellees should be restrained, and a hearing on the merits directed after defendants have answered.

ARGUMENT.

Appellants, in the two appeals in this case, herein consolidated, have noticed a total of twenty-three points as errors. Mature consideration of these far too numerous points leads to the necessary conclusion that basically these points fall into a lesser number of more comprehensive points. To consider the matter in that manner is not only more logical and concise but also efficient and therefore appellants have presumed to consolidate the various points of claimed error. It is trusted that thus a more compact brief can be presented and the time of this Court conserved.

I.

THE DISTRICT COURT OF GUAM ERRED IN DENYING THAT IT HAD JURISDICTION OVER THE SUBJECT MATTER OF THIS ACTION, THEREAFTER ASSUMING JURISDICTION OF THE CAUSE AFTER AN APPEAL HAD BEEN TAKEN AND THE CASE AND FILES TRANSFERRED TO THE APPELLATE COURT; AND SECONDLY HOLDING THAT IT COULD NOT GRANT AN INJUNCTION OR RESTRAINING ORDER UNTIL APPELLANTS HAD SUBMITTED TO APPELLEES' DEMANDS.

The District Court of Guam was in error and abused its discretion when it refused to grant a preliminary injunc-

tion, basing its ruling as was indicated by the Court in its statements (T.R. pp. 25-27, pp. 28-31). In essence this was a denial of jurisdiction to act as the appellants claim the court should. This is further brought out by the text of the order of dismissal entered on November 30, 1954 (T.R. p. 34).

Clearly the Court erred for two reasons. Upon the facts as alleged, and neither controverted nor denied, violations of the mandates of the United States Constitution were set forth, violations of Title 26, U.S.C.A. were charged, infringement of the provisions of Title 38, U.S.C.A. were set forth, and the construction of portions of Title 48, U.S.C.A. and violations of the same were alleged, all combined with allegations of denial of rights protected by the provisions of Title 42, U.S.C.A., the Civil Rights Statute of the United States. The only violation or infringement of territorial law set forth was the arbitrary disregard of the Code of Civil Procedure of Guam, Section 690 (13), and that right is also under the protection of the United States. Clearly, few citations of authorities are required to show that the District Court of Guam did have jurisdiction of the subject matter of this complaint and its dismissal of the same without giving appellants their day in court and opportunity to attempt to prove the same was reversible error.

State of Colorado v. Roger W. Toll, 69 L. Ed. 927 :

" . . . The object of the bill is to restrain an individual from doing acts that it is alleged that he has no authority to do, and that derogate from the quasi sovereign authority of the state. There is no question that a bill in equity is a proper remedy, and that it may be pursued against the defendant without joining either his superior officers or the United States. *Missouri v. Holland*, 252 U. S. 416, 431, 64 L. Ed. 641, 646, 11 A.L.R. 984, 40 Sup. Ct. Rep. 382. . . ."

Nutt v. Ellerbe, 56 F. 2d 1058:

"... It has been repeatedly held that the remedy at law must be plain and where there is doubt about it the taxpayer is not required to speculate and take the chances of being able to recover at law. *Davis v. Wakelee*, 156 U.S. 680, 15 St. Ct. 555, 39 L. Ed. 578; *Union Pac. R. Co. v. Board of Com'rs of Weld County*, 247 U. S. 282, 38 S. Ct. 510, 62 L. Ed. 1110; *Atlantic Coast Line R. Co. v. Doughton*, 262 U.S. 413, 426, 43 S. Ct. 620, 67 L. Ed. 1051, and cases cited therein. . . ."

Hynes v. Grimes Packing Co., 93 L. Ed. 1231:

"... If respondents show that they are without an adequate remedy at law and will suffer irreparable injury unless the enforcement of the alleged invalid regulation is restrained, a civil suit will enjoin. . . ."

Maryland & Virginia Milk Products Assn. Inc. v. Hazen, 85 F. 2d 302:

"... We do not agree with the contention of defendants that the court was prohibited from entertaining this suit by reason of section 3224, R. S. (26 U.S.C. sec. 1543 (26 U.S.C.A. sec. 1543)) which provides that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.' This section was intended to apply only to suits to restrain the assessment and collection of taxes levied by the United States. . . . This section, therefore, is not applicable to the present case, since the tax herein involved was not assessed by the internal revenue officers of the United States, but by municipal authorities, in order to defray the expenses of the District of Columbia, and would not, as such, become part of the general revenues of the United States. . . ."

Michael J. Healy v. Louis D. Tatta, 78 L. Ed. 1249:

"... It is true that where there is no method at law to test the legality of a tax without risk of incurring a

penalty, the imminence of the penalty may involve such a threat of irreparable injury as to satisfy the requirements of equity jurisdiction. See *Matthews v. Rodgers*, 284 U.S. 521, 526, 76 L. Ed. 447, 452, 52 S. Ct. 217.

“But the inability of a taxpayer to litigate the validity of a tax without risk of irreparable injury to his business, which is ground for invoking the equity powers of a federal court, affords no measure of the value of the matter in controversy.

“The disputed tax is the matter in controversy, and its value, not that of the penalty or loss which payment of the tax would avoid, determines the jurisdiction. . . .”

See also

Shelton et al. v. Gill, 202 F. 2d 503.

How then did the District Court of Guam come to such an erroneous conclusion? Basing its thoughts upon the provisions of Section 3653 Title 26, U.S.C.A. which refer solely to United States taxes, not the taxes of other jurisdictions, the Court apparently holds that this section is now part of the Codes of Guam. If this section applies and these are United States taxes, the Government of Guam and its agents have no authority, and the Commissioner of Internal Revenue is abandoning his mandatory duties.

The proper section, which the District Court of Guam should have considered and applied, but did not, is Section 1341, Title 28, U.S.C.A., which section while forbidding injunction with respect to taxes under state laws, provides specifically that the restrictions shall not apply where there is lacking a plain, speedy and efficient remedy in the courts of the state.

Acting upon the assumption that Section 3653 of Title 26, U.S.C.A., not Section 1341 of Title 28, U.S.C.A. applies, the Court construed this as precluding appellants from any opportunity to demonstrate the various infringements of rights protected by Federal law and the Constitution until and unless appellants had submitted to the very wrongs from which relief was sought.

The appellants were deprived of any opportunity to show by any evidence that there in fact did and does not exist any remedy, speedy, effective or efficient.

Appllants not only alleged the lack of any remedy and great and irreparable injury, but further substantiated this with their affidavits. Appellees, relying upon the unknown statute proclaimed by themselves to exist, and apparently relying upon the irrelevant and immaterial dicta of the District Court of Guam, chose not to oppose the sought interlocutory injunction. With the allegation of the irreparable injury threatened, the affidavits in support thereof, and no denial or evidence in opposition, appellants believe that good grounds for this injunction were established and that the District Court of Guam abused its discretion in denying the same.

After denying the request for the injunction, the District Court of Guam at the next hearing, and after appeal was taken, determined that it had no jurisdiction over the subject matter of this action, upon the reasoning that since appellants resisted and would not meekly submit to the infringement of their rights guaranteed by the Constitution and laws of the United States, they therefore were not entitled to any relief in the District Court of Guam of any nature.

In what manner can the reasoning of the Honorable and Learned Court sustain his holding that appellants possess no rights which can be protected?

In support of his holding, the only evidence considered was the improper affidavit of Mr. Mangerich which was in support of a summary judgment motion but which clearly sets forth the vast sums demanded of appellants and the threats to impose penalties. The question may be raised as to where, since appellants did not file income tax returns, Mr. Mangerich obtained his figure. These figures appellants admit are based upon the figures reported to the Government of Guam monthly by appellants under the provisions of the Business Privilege Tax Law of Guam which requires all persons engaged in a business or profession to report and pay tax upon their entire gross income. Appellants have always reported their gross income and paid the tax promptly. Appellants are convinced that the statutes and the cases clearly demonstrate that the District Court of Guam committed reversible error in dismissing the complaint.

Further, the Court erred in dismissing this action because the denial of the injunction sought, a denial we assert was based upon a wrong premise and bias in favor of a preconceived opinion, is shown by the statement of the Court made on pp. 30-31, T.R. Here the District Court of Guam ruled without confidence in its conviction; and impeded, hampered and infringed upon the appellate jurisdiction of this Court. (Consider also the various irrelevant and confusing statements of the Court on pp. 26-27, 29-31, T.R.) This action of the District Court of Guam clearly was intended to detract from the jurisdiction of this Court, and if, as sought

by the appeal, such an injunction was directed, there would be no parties and no proceedings remaining in the District Court upon which to act.

Also, the District Court of Guam erred in refusing to consider the clear and direct allegations in the complaint in no way connected with tax, setting forth violations of the statutes and Constitution from which protection and relief were sought. This, appellants claim, is error.

The Court also disregarded the fundamental rule that upon a motion to dismiss all allegations of the complaint stand admitted.

Callaway v. Hamilton Nat. Bank of Washington, 195 F. 2d 556:

“... in dealing with the record on this appeal, however, we must observe the usual rule that on a motion to dismiss, the plaintiff's allegations are to be taken as true and all reasonable favorable inferences arising therefrom are to be indulged. . . . A motion to dismiss should not be sustained ‘unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim set forth by the plaintiff.’ . . .”

National Exchange Club v. Reams, 4 F.R.D. 151:

“... In the instant case, that portion of the amended petition which seeks to restrain the Collector contains language almost, if not, identical with the language employed in the case of *Midwest Haulers, Inc., et al. v. Brady*, 6 Cir., 128 F. 2d 496. This case also holds that ‘allegations of the complaint are admitted by a motion to dismiss.’ . . .”

Camden Fire Ins. Ass'n v. Di Giovan, 75 F. 2d 808:

“... In the instant case, as the court dismissed the bill on motion, we must accept all the well-pleaded allegations of the bill of complaint as true.

“But there is still a further answer to this contention. The adequate remedy at law which will prevent the maintenance of a suit in equity in the federal court is a remedy at law available in the federal court. *Henrietta Mills v. Rutherford County*, 281 U. S. 121, 50 S. Ct. 270, 74 L. Ed. 737; *Smyth v. Ames*, 169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819; *Risty v. Chicago, R. I. & P. R. Co.*, 270 U. S. 378, 46 S. Ct. 236, 70 L. Ed. 641. . . .”

Inland Milling Co. v. Huston, 11 F. Supp. 813:

“... The only evidence before the court is the verified complaint of petitioner, and, for the purpose of this hearing, no other evidence being presented or offered, the court is required to accept as true the allegations of fact in such complaint, and the court here adopts such facts as findings of fact by the court. . . .”

For these reasons and numerous others appellants assert the District Court of Guam should be reversed, an injunction issue and appellees required to answer.

II.

THE COURT ERRED IN BASING ITS RULINGS ON FACTS NOT BEFORE IT; IN ACCEPTING AN AFFIDAVIT OFFERED BY APPELLEES AS CONCLUSIVE PROOF OF THE HEARSAY AND ALLEGATIONS CONTAINED THEREIN; AND FAILED TO OBEY THE PLAIN COMMAND OF RULE 56 THAT SUCH AN AFFIDAVIT IS SOLELY FOR THE PURPOSE OF PROVING THE ABSENCE OF MATERIAL CONTROVERTED ISSUES; THUS BY IMPLICATION HOLDING APPELLEES TO BE DULY AUTHORIZED TO COMMIT THE ACTS COMPLAINED OF AND ALSO THE EXISTENCE OF ADEQUATE PROCEDURES AND REMEDIES.

We ask first, what facts were before the Court? No witnesses testified; no evidence was taken. On the 12th day of November, 1954, at a hearing upon a motion for a prelimi-

nary injunction, the only facts presented to the Court for its consideration were the allegations of fact contained in the complaint and the affidavits filed by appellants. As upon a motion to dismiss, it is presumed that likewise the uncontroverted allegations of fact contained in the complaint and supported by the affidavits of both appellants must and should be for the purposes of the motion taken as true. The appellees were fully advised of the basis for the injunctive relief sought by appellants and yet chose not to oppose it in any manner. In fact, if this Court will consider the amazing transcript (T.R. pp. 25-28) of this hearing, it will discover that the motion was not even mentioned by the appellees, their only comments being on a motion to dismiss, never noticed to appellants, and filed on that morning.

The Court's attention is invited to the fact that after appellants objected to the appearance of Mr. Otto and Mr. Rosenberry, appellants were never again permitted to comment on the motion before the Court. The Court proceeded to discuss many matters, but not the motion.

The second hearing in this case, a hearing upon a motion by appellees to dismiss, was had on the 26th day of November, 1954. The motion had been filed on the morning of the 12th day of November, 1954, just prior to the hearing of appellants' motion for injunctive relief. No notice of motion pertaining to this motion to dismiss was ever filed or served upon appellants. During the first hearing on November 12, 1954, the Court discussed this motion to dismiss freely and when it was brought to his attention that there was no notice of motion on file, the Court arbitrarily set this motion to dismiss to be heard on the 26th day of November, 1954. The Court was obviously aware of the contents of this mo-

tion to dismiss as he commented upon the contents and supporting affidavit familiarly, although he obviously had no opportunity to review either the motion or the affidavit after it was filed and before the hearing on that morning. At the hearing on the 26th day of November, 1954, the Court refused to recognize that this cause was on appeal and that the entire file was in the possession of the Clerk of the Ninth Circuit Court of Appeals.

Appellants assert that since this was a hearing upon a motion to dismiss based upon the grounds of failure to state a claim and lack of jurisdiction over the subject matter, coupled with a motion for summary judgment, the Court erred in dismissing this action since it is plain under the rules and the cases that jurisdiction of the subject matter was set forth on numerous grounds in the complaint and in nowise was its absence demonstrated. Jurisdiction was plainly alleged on Constitutional grounds, under Title 26, U.S.C.A., Title 38, U.S.C.A., and though not specifically alleged by reference to the title, a claim under the Civil Rights provisions of Title 42, U.S.C.A. was spelled out throughout.

Upon a motion to dismiss, the motion must be denied if a claim upon which relief can be granted is in any way set forth in the complaint and its absence not demonstrated by the movant. The allegations of the complaint for the purposes of the motion must be admitted as true. Wherein does the record support the ruling of the District Court of Guam?

The following citations support appellants' contention:

Person v. United States, 112 F. 2d 1:

“... The second ground for attack upon the summary judgment procedure is that the court considered a sup-

porting affidavit not made 'on personal knowledge', as required by Rule 56 (e). The Rule contains such a requirement and this affidavit does not conform thereto, and, therefore, is of no avail. . . ."

United States v. Kehoe, 4 F.R.D. 306:

"... The plaintiff's motion for summary judgment is supported by an affidavit which does not state, as required by the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, that it is made on the personal knowledge of the affiant. Plaintiff contends that Rule 56 permits a motion for summary judgment to be made with or without supporting affidavits. The plaintiff, having elected to make various allegations in the supporting affidavit and having elected to attach various exhibits to the supporting affidavit, which it must have considered necessary to support the motion, must be governed now by the Rule or supporting affidavits. The supporting affidavit is not made on personal knowledge as is required by the Rule, and is therefore faulty . . ."

Furton et al. v. City of Menasha, 149 F. 2d 1945:

"... On this motion for summary judgment we must accept the allegations of complaint as true. Defendant's position is likewise simple . . ."

Wittlin v. Giacalone, 154 F. 2d 20:

"... We are impelled to that conclusion because it is well established that one who moves for summary judgment has the burden of demonstrating clearly the absence of any genuine issue of fact, and that any doubt as to the existence of such an issue is resolved against the movant. The courts are quite critical of the papers presented by the moving party, but not of the opposing papers. Indeed, Professor Moore says in his work on Federal Practice Under the New Federal Rules:

'Even if the pleading of the party opposing the motion is defective and does not state a sufficient

claim or defense, the motion will be denied, if the opposing papers show a genuine issue of fact.' . . ."

Callaway v. Hamilton Nat. Bank of Washington, 195 F. 2d 556:

"... In dealing with the record on this appeal, however, we must observe the usual rule that on a motion to dismiss, the plaintiff's allegations are to be taken as true and all reasonable favorable inferences arising therefrom are to be indulged. *Dioguardi v. Durning*, 2 Cir., 139 F. 2d 774. A motion to dismiss should not be sustained 'unless it appears to be a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim set forth by the plaintiff.' *Dennis v. Village of Tonka Bay*, 8 Cir., 151 F. 2d 411, 412. See also *Dollar v. Land*, 81 U. S. App. D. C. 28, 154 F. 2d 307, affirmed 330 U. S. 731, 67 S. Ct. 1009, 91 L.Ed. 1209. Further, regardless of what label may be attached to this proceeding at this stage, we think we must dispose of it on the following basis: First, as indicated above, we must take plaintiff's assertions of fact as true—they are not disputed, nor are they patently false. Second, we must not attempt to resolve any conflict in the inferences to which they give rise, for to do so would go beyond the proper scope of either a motion to dismiss or one for summary judgment. *Sartor v. Arkansas Gas Corp.*, 321 U. S. 620, 64 S. Ct. 724, 88 L.Ed. 967; *Ottinger v. General Motors Corp.*, D. C. S. D. N. Y., 27 F. Supp. 508; *Farrall v. District of Columbia*, A.A.U., *supra*. Third, we must determine whether, if all conflicting inferences were to be resolved in plaintiff's favor at a trial, he would nevertheless not be legally entitled to a recovery . . ."

The Court found that these appellees are officers being sued in their official capacities (T.R. p. 25, last paragraph, pp. 28, 29, 30) and that they were, therefore, acting within

the scope of their authority. This he found without any substantiation other than possible hearsay and knowledge which the Court must have acquired privately. This is amply borne out by the failure of counsel for appellees to argue their motion and the extensive argument appearing in the record on behalf of appellees made by the Court. The Court blandly concluded that there was no question of any acts in excess of authority on the part of appellees.

The Court plainly intended, and again it is borne out by the record, that the record of this hearing should reflect his own conclusions as to what the basis for the financial structure of the Government of Guam should be. His discussion was not pertinent to the pleading or the motion before him. He never permitted appellants to argue against the motion itself, as is clearly shown by the transcript.

III.

CAN PUBLIC OFFICIALS SHIELD THEIR INDIVIDUAL ACTS IN EXCESS OF THEIR STATUTORY AUTHORITY BEHIND THE CLOAK OF THEIR OFFICIAL TITLE OR OFFICE?

Appellants believe that the Courts of the United States have consistently maintained a clear cut distinction between the acts of an individual within the scope of his statutory authority, for which acts he may claim the protection of his office, and the other category of acts by such officials falling into two classes, the first being acts in excess of and outside the scope of their authority; the second class being acts either contrary to the scope of authority or those without any statutory authority whatsoever.

It is the latter two classes of acts which these appellees are, in the complaint, charged with, and from which relief is sought.

A basic principle in the construction of pleadings of such long standing as to require no citation of authority on the principle that on a motion to dismiss all allegations of the complaint stand admitted. The single affidavit in support of defendants' motion to dismiss, which affidavit consists almost entirely of conclusions of law and hearsay, does not in any way controvert the allegations of the complaint. It in no way refutes the allegations of the complaint alleging that the appellees are acting in excess of their authority and in the absence of any statutory authority, and therefore cannot be acting as government officers and were properly sued in their individual capacities. The District Court of Guam not only can, but must, take judicial notice of the statutes of the unincorporated territory of Guam, particularly the provisions of Title XX, Government Code of Guam, and the further fact that this title contains all of the statutes with respect to tax of this territory. A reading of the text of Title XX clearly refutes the entire position of the appellees as to their rights to seek protection as employees or officials of the unincorporated territory of Guam. The complaint clearly sets forth the fact that this action was instituted, not against the Government of Guam, but against Richard Taitano and Harry L. Mangerich alone, T. R. p. 4, Paragraph 3 of the complaint. The District Court of Guam apparently closed its eyes to the pleading before it as shown by the statements of the Court, T. R. p. 25, last paragraph, first sentence.

The following citations of authority bear out appellants' contentions:

Marion H. Allen v. Regents of the University System of Georgia, 82 L. Ed. 1449. "... We are not unmindful of the principle that suits against officers to restrain action in excess of their authority or in violation of statutory or constitutional provisions are in their nature personal . . ."

Bomberger v. International Freighting Corporation, 92 F. Supp. 611. "An action can be maintained against an agent of the United States at common law for the agent's own torts. *Brady v. Roosevelt S. S. Co.*, 317 U. S. 575, 63 S. Ct. 425, 87 L. Ed. 471."

Clearly, the appellees cannot claim the protection of their titles and should be required to meet the allegations of the complaint with competent evidence, if possible, at a hearing on the merits.

IV.

THE DISTRICT COURT OF GUAM WAS IN ERROR IN ITS INTERPRETATION OF STATUTES OF THE UNITED STATES AND IN HOLDING BY IMPLICATION THAT IN ANY MANNER THEY ARE STATUTES OF GUAM.

We are, in brief, discussing the proper construction of certain sections of the Organic Act of Guam as set forth in Chapter 8A of Title 48, U.S.C.A.

This Act, since its inception, has been the basis of considerable litigation in the District Court of Guam and this Court has had before it several of these cases on appeal.

Legislation for Guam falls into three categories. First is legislation by the Congress of the United States which applies to Guam. Second is legislation by the Guam Legislature. Third is special legislation by the Congress of the

United States expressly amending or adding to the Codes of Guam. Other than the Organic Act continuing the existing Codes of Guam in effect, there has been no legislation of the third type to this date. There has been no legislation in the second category in regard to income taxes or any matters related thereto.

Therefore, we have the Organic Act of Guam with its Section 31. We have the misconstruction on the part of the District Court of Guam, which incorporates the Internal Revenue Code of the United States, with an unknown number of deletions, changes and modifications, into the Codes of Guam. We have officials of the Government of Guam cloaking themselves with all of the authority of the Commissioner of Internal Revenue of the United States. We have the District Court of Guam, after incorporating portions of the United States Internal Revenue Code into the Codes of Guam, construing those sections so as to give local officials all of that Federal authority, but at the same time giving those same officials *carte blanche* to amend, delete, alter and supplement the Federal statute, thus depriving the residents of Guam of administrative remedies under the same alleged law, in depriving that resident of the equal protection of the law and in violating his civil rights with impunity.

Where does this misconception lie? The Organic Act of Guam is a true United States statute and must be treated and interpreted as such. The District Court of Guam has treated it as special legislation which, by Section 31 of said Act, lifts the incomplete and altered text of the Internal Revenue Code of the United States and places it in the local codes. Clearly this is legislation by the District Court of

Guam acting in conjunction with the executive department of the Government of Guam. A statute of the United States, while it can be copied or adopted by a local legislative entity, cannot be incorporated into the statutes of that jurisdiction by implication. It must be adopted by express enactment either by the Congress of the United States or the legislative body of the local unit. The income tax of the Territory of Alaska is an example of the adoption of a Federal statute for use by a local legislature wherein the Federal statute is taken in its exact text and the local legislature specifically provides how the Act shall be construed for local application, even to specifying the inclusion in the local law of future enactments by the Federal Congress.

Obviously, in the case of Guam this is not so. As stated above, the Legislature of Guam has never acted upon any phase of the income tax problem. It is plainly seen that we do not have here a local statute using the text of the Federal statute.

What do we have in Guam? In the absence of a statement by the Congress enacting the income tax laws of the United States as a local statute, and of this there is no evidence, we have a Federal statute which states simply that the income tax laws of the United States are in force in Guam. Did not the District Court of Guam err in reading into this single sentence not only the full text of those laws, but those laws altered by administrative action, creating the local officers and authorities necessary to administer the act, and by implication also reading in the necessary penal provisions to enforce compliance with it.

Can the District Court of Guam or any other court so construe one sentence to not only contain a large body of law

taken from numerous titles of the United States Codes, but also to contain changes, deletions and additions subject to the whims of local administrators not subject to the restraining provisions of those same laws or accountable to any competent authority, and, since this alleged code is not published, and, as this court may notice, no tax court or other safeguards do exist, can on the one hand there exist the enforcement provisions yet on the other, none providing any means for a citizen to seek relief or appeal the actions of appellees and others no matter how capricious, arbitrary or unwarranted. Appellants contend not. Appellants further contend that it is not only illogical but a legal impossibility for the income tax laws of the United States as cited by Section 31 of the Organic Act of Guam to be deleted in unspecified, unpublished and unidentified parts from the Federal statutes and to be made an additional part of the Codes of Guam to be construed and treated as a local law and that the District Court of Guam erred when it held portions of Title 26, U. S. C. A. to be also a local territorial law. By acting upon such an erroneous premise the conclusions that have been drawn by the District Court of Guam are therefore also erroneous.

V.

THE DISTRICT COURT OF GUAM ERRED IN FAILING TO TAKE JUDICIAL NOTICE OF THE PROVISIONS OF SECTION 454A, TITLE 38, U. S. C. A. AND OF SECTION 690 (13) OF THE CODE OF CIVIL PROCEDURE OF GUAM.

The District Court of Guam is charged with the duty and in a proper case must judicially notice appropriate and pertinent statutes of the United States and of Guam. This

the Court did not do even though Section 690 of the Code of Civil Procedure of Guam is mandatory in its terms and actually goes further than Section 454A, Title 38, U. S. C. A. Both sections are quoted in full ante Page 29 and Page 25.

Section 454A, Title 38, U. S. C. A., says in part:

“ . . . payment of benefits . . . shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.”

Section 690 (13) Code of Civil Procedure of Guam states:

“The following property is exempt from execution or attachment, . . . all money received . . . as a pension from the United States . . .”

In view of these mandatory provisions of the statutes of the two governments, it is not clear that the Court was in error in not having found that Appellant, Finton J. Phelan, Jr., was deprived of property in violation of law and in denying the relief sought.

Appellants contend that the District Court should be reversed.

VI.

THE DISTRICT COURT OF GUAM ERRED IN PERMITTING LAYMEN NOT MEMBERS OF THE BAR TO APPEAR AND REPRESENT THE APPELLEES AS THEIR ATTORNEYS.

This action is one against the Appellees as individuals, not as officials of the Government of Guam. The Government of Guam is not a party hereto. Yet the District Court of Guam permitted two employees of the Attorney General of Guam to appear and represent the Appellees contrary

to the express provision of the Statutes of Guam and the rules of the Court.

It is of ancient origin that unless a party appears for himself he may only be represented in court by a member of the bar of such court. The Appellees were not represented by attorneys. T. R. Page 25:

“Mr. Phelan: If it please the Court, the Government of Guam is not a party to this case and Mr. Otto and Mr. Rosenberry, who are appearing for these defendants, are appearing as private individuals, and they are not members of the bar of this Court, and I must object to their appearing in this action.

The Court: The Court will overrule that objection. This is an action against officers in their official capacity and is an action against the Government.”

See also Government Code of Guam, Section 2802.

Further, the Guam Statutes forbid any person employed by the Government to represent or appear for private parties. Government Code Sections 3001 and 3003.

Therefore, Appellants contend that this action of the District Court of Guam was error, demonstrated an indifference to the Statute and clearly showed the preformed conclusions of the Court—that the District Court should be reversed.

VII.

IT IS CONTENDED BY APPELLANTS THAT IN ADDITION TO THE ERRORS DISCUSSED ANTE, THEY WERE DEPRIVED ERRONEOUSLY BY THE DISTRICT COURT OF GUAM OF THEIR DAY IN COURT AND OF THE OPPORTUNITY TO DEMONSTRATE THE FOLLOWING MAJOR POINTS RAISED BY THE ALLEGATIONS SET FORTH IN THE COMPLAINT.

- (a) That the Court demonstrated bias and a closed mind by ignoring the constitutional questions contained in the complaint.

The Court, by its dismissal of this action, clearly demonstrated that it had reached its decision upon matters not contained in the record, nor introduced by any party, that no questions existed other than the claim of appellees to possess the right to collect a tax not contained in local statutes though presumably contained in an unpublished amended version of Title 26 U.S.C.A. Also, since appellants had refused to submit to the actions and demands of private parties, they possessed no rights which the District Court of Guam was required to acknowledge. The Court clearly demonstrated that it had no intention of recognizing or considering the fact, that even were the statutes to be as the appellees claim, that as private individuals they can be sued for acts beyond and outside the scope of their authorities and duties. Obviously, even a valid law may be so administered that the mode of administration is illegal and warrants relief. It is only by the taking of evidence that such facts can be demonstrated, and appellants were and have been effectively precluded from submitting any such evidence.

(b) The illegal assumption of the legislative powers of the Congress and the usurpation of the reserved powers of the Congress to lay and collect taxes in violation of the Constitution of the United States.

It is so basic as not to require the citation of authority that the legislative powers and authority of the Congress cannot be assumed or asserted by anyone and that if, in fact, a grant of power or duty is made, even by express act of the Congress, and such grant permits the exercise of legislative powers, it is void as being beyond the power of the Congress. If the Congress cannot grant the authority to anyone to legislate in a Federal field, can such power be assumed or seized by individuals? Appellants claim that it is a premise so simple and clear as to be obvious. It is, appellants urge, a fact admitted by all that Congress may delegate duties including that of administering, applying and construing the meaning of the text of a statute, but it is the statute as written by the Congress that is to be construed and applied. In innumerable cases it has been held that construction cannot change, alter or amend a statute. Can it be held otherwise than a clear invasion of the legislative powers of the Congress, to delete, add to, substitute words, change names, and otherwise re-write the text of a statute? If this is not legislation, appellants inquire what more could Congress itself do? Appellants contend that only by the reception of evidence and the demonstration of the acts alleged can the District Court of Guam or any other court determine the fact, whether or not these defendants have usurped that power in violation of the Constitution. Likewise, in creating themselves officers vested with these powers without any statutory delegation of duty on which to base their actions, do not these appellees likewise usurp

the authorities of the Congress to pay and collect taxes? The codes of Guam as this Court may notice do not grant such power. The statutes of the United States likewise do not. In the absence of evidence, can the District Court of Guam in any way intelligently pass upon this asserted and alleged constitutional infirmity?

(c) That the defendants have violated the provisions of the Fourth and Fifth Amendments to the Constitution of the United States.

The acts of the defendants which may constitute such a violation cannot, without evidence, be weighed. Can the District Court of Guam or any other Court pass upon such an action without receiving the evidence which appellants sought to introduce in support of their contention that these amendments had been violated? Appellants further contend that this violation is under color of authority of a Federal Statute, that it is the Organic Act of Guam and therefore that it is a proper matter to be considered by the District Court of Guam. Can the Congress of the United States authorize in any possession, or elsewhere, the denial of the equal protection of the laws of the United States as asserted by appellants that the defendants and others have denied them? Can the Congress of the United States authorize appellees or others to seize property of appellants and to deprive appellants of such property contrary to the provisions of the Fourth and Fifth Amendments? Can appellees threaten and strive to deprive appellants of their means of obtaining a livelihood?

Appellants claim that only through the presentation of evidence and not upon a motion can such issues be determined and that the District Court of Guam has effectively

precluded them from their opportunity of demonstrating the facts as alleged in the complaint. The opportunity to demonstrate denial to appellants of the equal protection of the laws and of due process of law, affecting both appellants and numerous clients, presumably innocent and unable to safeguard their interests, and the existence of irreparable harm and injury as asserted was denied. Can such be demonstrated on a motion?

In seeking the temporary injunction until a determination of this cause upon the merits, appellants presented affidavits in support of their request. These affidavits were not controverted in any way; yet it was conclusively assumed by the District Court of Guam that it did not possess the power to grant relief. No opportunity was given to appellants to demonstrate that under the peculiar facts and circumstances of this cause there was no adequate remedy at all. The harm demonstrated is irreparable, and the danger is so imminent that relief should be granted. Appellants have denied and continue to deny that they owe to the appellees or to anyone else, including the Government of Guam, the sums of money or any part of said sums which these appellees have asserted their right to levy and receive. Appellants have claimed without denial that they will be impoverished, that the harm can in no way be repaired, that their only recourse is to the protection of the Courts of the United States. This recourse, appellants believe, has so far been unavailable.

(d) That Chapter 8A, Title 48, Section 1421i, U.S.C.A., as interpreted by the defendants is repugnant to the Constitution and laws of the United States.

It contains no standards for the administration, operation, and collection of any income tax; it is indefinite and uncertain and also vague and ambiguous in that, as interpreted, it does not contain or set forth the text of the statute. The statute claimed by appellees to be therein contained, while asserted by them to be portions of Title 26 U. S. C. A., is unknown to appellants. Changes are not apparent, and cannot be determined by recourse to any portion of said Chapter 8A. It is impossible to determine, even with the assistance of extrinsic aids to construction including the legislative history of this Act, what sections of Title 26 apply to Guam, what sections have been altered and deleted, added to, changed or otherwise modified; who has the power and authority to make changes and modifications. Nowhere is there contained any grant of authority to administer, to collect, or to enforce this statute claimed to exist by the appellees.

It is impossible to determine the officers or individuals charged with duties under the Act and reference to the codes of Guam in no way enlightens one. The construction appellees have advanced clearly violates all of the precepts for the construction of statutes as laid down by the Supreme Court of the United States. It is clear that as construed by appellees, Section 1421i imposes a tax by implication, that their construction creates and imposes penal provisions, penalties and sanctions, and that in general their construction violates the clear text of that Section.

Probably the most fundamental evil is the fact that the simple language of this Section contains, when read in con-

nection with Title 26 U.S.C.A., a clear, workable and practical tax statute, with clearly defined limits of the power and authority of the officials designated to administer it, who they are, how the law shall be administered and to whom and where the taxes shall be paid. Appellants contend that the proper construction of this statute is that this Section reaffirms and continues the application to Guam of Title 26 U.S.C.A., which Title for many years has applied to Guam and which is continued in effect, subject to such future alterations as the Congress may from time to time make in its text. This statute clearly places full responsibility for the collection of income taxes on the Commissioner of Internal Revenue of the United States; specifically forbids the delegation by him of authority except to specified subordinates within his service; imposes upon him specific duties; and does in fact contain a practical and workable system.

The system is plain. The income tax laws of the United States are the tax laws that apply to Guam. They are not laws of Guam. Persons liable to a tax under this statute are clearly directed to file their returns with the District Director of Internal Revenue at Baltimore, Maryland and to make their payments to that official. He, in like manner, will dispose of said funds as he must by statute dispose of all funds coming into his possession. The fact that the Organic Act of Guam contains provisions for the Treasury of the United States to remit such funds to the Treasury of the unincorporated territory of Guam is no portion of any taxing statute but is merely a grant or appropriation of funds, said funds to be measured by the amount of Federal Income Tax revenue derived from sources within Guam. They are taxes, if owed to anyone, owed to the United

States. Can construction change this statute? Appellants contend that they have been deprived improperly of their opportunity to present authorities sustaining their contention.

(e) Violation of the Bill of Rights of Guam.

Appellants contend that clear violations of the protection provided for them and others in the Bill of Rights of Guam, a portion of the Organic Act of Guam, have been alleged in their complaint and that they have been deprived of any opportunity to substantiate by evidence their contentions.

CONCLUSION.

Appellants submit that the District Court of Guam should be reversed; that an injunction should issue; that appellees should be required to answer the complaint and meet the allegations contained therein.

Dated, Agana, Guam,

April 25, 1955.

Respectfully submitted,

FINTON J. PHELAN, JR.,

E. R. CRAIN,

Pro se.

No. 14,585

IN THE
United States Court of Appeals
For the Ninth Circuit

FINTON J. PHELAN, JR., and E. R. CRAIN,
Plaintiffs-Appellants,

VS.

RICHARD TAITANO and HARRY L. MANGERICH,
Defendants-Appellees.

Appeal from the Judgment of the
District Court of Guam.

Civil Case No. 69-54.

BRIEF OF APPELLEES.

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LOUIS A. OTTO, JR.,
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LEON D. FLORES,
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FILED

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No. 14,585

IN THE

United States Court of Appeals
For the Ninth Circuit

FINTON J. PHELAN, JR., and E. R. CRAIN,
Plaintiffs-Appellants,

VS.

RICHARD TAITANO and HARRY L. MANGERICH,
Defendants-Appellees.

**Appeal from the Judgment of the
District Court of Guam.**

Civil Case No. 69-54.

BRIEF OF APPELLEES.

JURISDICTION.

This case was instituted by a complaint filed in the District Court of Guam seeking a money judgment against the appellees—the defendants below—for income taxes collected by the appellees by distraint pursuant to Section 31 of the Organic Act of Guam, Act of August 1, 1950, c. 512, Section 31, 64 Stat. 383, 392, 48 U.S.C., Section 1421i, a declaration that the assessments, levies, warrants of distraint, and notices of tax liens with regard to appellants are void, and a temporary injunction, to be followed by a permanent injunction, against further enforcement of the tax.

The District Court of Guam is the court of general jurisdiction for the unincorporated territory of Guam, Section 22 of the Organic Act of Guam, Act of August 1, 1950, c. 512, Section 22, 64 Stat. 383, 389, 48 U.S.C., Section 1424.

The District Court of Guam dismissed appellants' motion for a temporary injunction and subsequently granted appellees' motion to dismiss the complaint on the grounds that the court had no jurisdiction. Appellants appealed from both orders of the District Court.

Jurisdiction is conferred on this court by 28 U.S.C., Section 1291 and 1294, as amended by the Act of October 31, 1951, c. 655, Sections 48 and 50(a), 65 Stat. 710, 726, 727.

HISTORY.

This is an appeal from the judgment of the District Court of Guam dismissing the complaint of the plaintiffs-appellants.

The complaint was filed against two tax officials of the Government of Guam, as individuals. These officials are the present Director of Finance and Commissioner of Revenue and Taxation.

The complaint seeks to recover a personal judgment against the defendants-appellees for income taxes collected by distraint from the appellants for the years 1951 and 1952. These income taxes were assessed and collected pursuant to Section 31 of the Organic Act of Guam, 48 U.S.C., Section 1421i. In addition the com-

plaint asks that the assessments, levies, warrants of distraint and tax lien notices with respect to appellants be voided, and that a temporary and a permanent injunction be issued against further enforcement of Section 31 on the ground that it does not create a separate territorial income tax enforceable by the appellees.

Appellants' motion for temporary injunction was denied and an immediate appeal was filed.

Subsequently appellees' motion to dismiss the complaint was granted. A second appeal was taken by the appellants.

The two appeals have been combined.

STATEMENT OF THE CASE.

This case is one of a number filed in the District Court of Guam to secure the overruling of *Laguana v. Ansell*, 102 F. Supp. 919, affirmed by this court, 212 F. 2d 207, writ of certiorari denied, 348 U. S. 830, 75 S. Ct. 51, 99 L. Ed. 32.

The *Laguana* case holds that by Section 31 of the Organic Act of Guam, 48 U.S.C., Section 1421i, 64 Stat. 392, the United States Congress enacted a territorial income tax to be enforced by the territorial government.

Two other cases are now on appeal to this court raising this same basic question, whether *Laguana v. Ansell* should be overruled, in both of which the present plaintiffs-appellants are counsel. These are *Wilson v. Kennedy*, No. 14, 593, reported in 123 F. Supp. 156, and *Lamkin v. Brown & Root, Inc.*, No. 14772.

In a fourth case, *Holbrook v. Taitano*, a notice of appeal was filed in the District Court but subsequently dismissed by the appellant. The opinion of the District Court in the *Holbrook* case is reported in 125 F. Supp. 14.

In the present case the appellants have filed suit against two officials of the Government of Guam in their individual capacity. These are Richard Taitano, the Director of Finance, and Harry L. Mangerich, Commissioner of Revenue and Taxation.

Appellants, who appear as counsel pro se, allege in their complaint that they have practiced law in Guam since 1951 (R. 3-4); that Appellee Taitano, defendant below, is charged with the duties of enforcing revenue statutes enacted by the Guam Legislature (R. 4); that Appellee Mangerich, defendant below, is charged by statute with enforcement of the Business Privilege Tax Law, an enactment of the Guam Legislature (R. 4); that appellees have damaged appellants by performing illegal acts under claim of authority not granted by the statutes of the United States or Guam (R. 4).

The complaint further alleges that the appellees purport to be enforcing a "Guam Income Tax Law" based upon the Organic Act of Guam (R. 4) which appellees claim they were delegated to enforce by the Governor of Guam (R. 5), and that the law is based on the United States income tax, including the provisions for assessments, levies, attachments, summons, and criminal enforcement (R. 5-6).

Appellants then allege that appellees “acting unlawfully in the manner set out above”—referring to the enforcement of an alleged Guam income tax—(R. 6) have harassed appellants with summons, made income tax assessments, filed notice of tax liens, issued distrains and levied on their bank accounts (R. 6-7). They allege the assessments are based primarily on gross income (R. 6); however, appellants do not allege their net taxable income.

Appellants allege irreparable harm to themselves in the practice of their profession and the earning of their livelihood by these actions (R. 10-11).

Appellant Phelan further alleges (R. 11-12) that his World War II disability payment checks have been deposited in the bank accounts distrained upon by appellees, and distraint on the proceeds of such checks is in violation of 38 U.S.C.A., and Section 690, Subsection 13, of the Code of Civil Procedure of Guam.

Judgment is demanded (R. 12) in favor of Appellant Phelan in the amount of \$311.39 and in favor of Appellant Crain in the amount of \$882.94 by reason of the distraint upon appellants’ bank accounts. It is asked that the assessments, levies, distrains, and liens against appellants be declared void, and that temporary and permanent injunctions restraining further tax enforcement by appellees be granted. (R. 12).

Appellants do not allege in their complaint that they demanded any refund from the appellees, or anyone else, of the amounts for which judgment is sought. They do not allege they have or have not filed income

tax returns with the United States or the Government of Guam for the years in question. They do admit, however, in their brief (Appellants' Brief, 39) that they have filed no income tax returns with the Government of Guam.

Appellants filed a notice of motion for a preliminary injunction (R. 13), and their own affidavits in support thereof (R. 15, 17), the hearing being set for November 12, 1954.

The District Court denied the motion for preliminary injunction at the hearing (R. 25-28) on the ground that Section 31 of the Organic Act created a separate territorial tax and that appellants were not entitled to injunctive relief against any alleged abuse of discretion or oppression when they have not shown compliance with the law.

Appellants filed notice of appeal on November 12, 1954 (R. 23).

Appellees had filed a motion to dismiss and for summary judgment on November 12, 1954 (R. 19), which subsequently came up for hearing on November 26, 1954 (R. 28-32).¹

¹It is stated in appellants' brief at page 42:

"No notice of motion pertaining to this motion to dismiss was ever filed or served upon appellants."

However, the record shows that such a Notice of Motion was filed (Supplemental Record, 45-46), together with an affidavit of service on both appellants covering the Notice of Motion, motion and affidavit of appellee Mangerich (Supplemental Record, 46). Appellants' Designation of Contents of Record on Appeal (Supplemental Record, 47-48), filed November 18, 1954, also lists under Item 3: "Defendant-Appellees' Motion, Notice of Motion and supporting affidavits."

At the hearing on November 26, 1954 the appellants objected that since they had filed an appeal from the ruling of the District Court of November 12, 1954, denying their motion for a preliminary injunction, that the entire case was now before the Court of Appeals. The court ruled in effect that the appeal was only with regard to the denial of the preliminary injunction and thereupon proceeded to hear the motion of the appellees.

Referring again to the decision in the *Laguana* case, the court ruled that if the appellants were discriminated against, they would be entitled to the intervention of the court provided they had done all they could to protect themselves, but that in the present instance the complaint does not show that the appellants have filed any tax returns or paid the tax (R. 30). The court continued:

“ . . . The court will make the same ruling in this case as it did in the *Holbrook* case.² With the absence of any showing that the plaintiff has complied with the local income tax law by filing returns and paying the tax, the court is without jurisdiction and the case is dismissed . . . You should prepare an order dismissing the action for the reason that the court has no jurisdiction under the allegations of the complaint” (R. 31).

The order of dismissal was entered on November 30, 1954 (R. 34). A notice of appeal was filed December 6, 1954 (R. 35).

²*Holbrook v. Taitano*, supra (DC Guam, 1954) 125 F. Supp. 14.

QUESTIONS PRESENTED.

The questions presented are:

1. The basic fundamental question is whether the decision in the *Laguana v. Ansell*, holding that Section 31 of the Organic Act of Guam imposes a separate territorial income tax to be collected by the proper officials of the Government of Guam, should be overruled.

2. Whether the District Court erred in following *Laguana v. Ansell* in holding that Section 31 of the Organic Act of Guam imposes a separate territorial income tax to be paid to the proper officials of the Government of Guam.

3. Whether the appellees are properly authorized to enforce the separate territorial income tax created by Section 31 of the Organic Act of Guam.

4. Whether there is any constitutional issue warranting the overruling of *Laguana v. Ansell*.

5. Whether the District Court erred in ruling that it did not have jurisdiction over the subject matter of the action.

6. Whether by virtue of Section 7422 of the Internal Revenue Code of 1954 the complaint states a cause of action for refund of taxes collected.

7. Whether the District Court retained jurisdiction of the case following appellants' appeal from the denial of their motion for temporary injunction.

8. Whether appellant Phelan's separate cause of action, based on the alleged immunity of the proceeds of his disability payments, was properly dismissed by the District Court.

9. Whether the District Court erred in permitting members of the Attorney General's staff to represent appellees.

STATUTES AND RULES INVOLVED.

Organic Act of Guam, C. 512, 64 Stat. 384:

“Section 6(b). The Governor shall have general supervision and control of all executive agencies and instrumentalities of the government of Guam. He shall faithfully execute the laws of the United States applicable to Guam, and the laws of Guam. He may grant pardons and reprieves and remit fines and forfeitures for offenses against the local laws, and may grant respites for all offenses against the applicable laws of the United States until the decision of the President can be ascertained. He may veto any legislation as provided in this Act. He shall commission all officers that he may be authorized to appoint. He may call upon the commanders of the armed forces of the United States in Guam, or summon the posse comitatus, or call out the militia, to prevent or suppress violence, in surrection, or rebellion; and he may, in case of rebellion, invasion or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place Guam, or any part thereof, under martial law, until communication can be had with the President and the President's decision thereon communicated to the Governor. He shall annually, and at such other times as the President of the Congress may require, make official report of the transactions of the govern-

ment of Guam to the head of the department or agency designated by the President under section 3 of this Act, and his said annual report shall be transmitted by such department or agency to the Congress. He shall perform such additional duties and functions as may, in pursuance of law, be delegated to him by the President, or by the department or agency. He shall have the power to issue executive regulations not in conflict with any applicable law. The Governor may submit such recommendations for the enactment of legislation to the legislature as he shall consider to be in the people's interest." (48 U.S.C. 1952 Ed., Sec 1422(b))

"Section 9(b). The Governor may appoint or remove any officer whose appointment or removal is not otherwise provided for. All officers shall have such powers and duties as may be conferred or imposed on them by law or by executive regulation of the Governor not inconsistent with any law." (48 U.S.C. 1952 Ed., Sec 1422c(b))

"Section 30. All customs duties and Federal income taxes derived from Guam, the proceeds of all taxes collected under the internal-revenue laws of the United States on articles produced in Guam and transported to the United States, its Territories, or possessions, or consumed in Guam, and the proceeds of any other taxes which may be levied by the Congress on the inhabitants of Guam, and all quarantine, passport, immigration, and naturalization fees collected in Guam shall be covered into the treasury of Guam and held in account for the government of Guam, and shall be expended for the benefit and government of Guam in accordance with the annual budgets." (48 U.S.C. 1952 Ed., Sec 1421h)

“Section 31. The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam.” (48 U.S.C. 1952 Ed., Sec 1421i)

United States Internal Revenue Code of 1954:

“Section 6334. Property Exempt from Levy.

(a) Enumeration. There shall be exempt from levy:

(1) Wearing Apparel and School Books. Such items of wearing apparel and such school books as are necessary for the taxpayer or for members of his family;

(2) Fuel, Provisions, Furniture, and Personal Effects. If the taxpayer is the head of a family, so much of the fuel, provisions, furniture, and personal effects in his household, and of the arms for personal use, livestock, and poultry of the taxpayer, as does not exceed \$500 in value;

(3) Books and Tools of a Trade, Business, or Profession. So many of the books and tools necessary for the trade, business, or profession of the taxpayer as do not exceed in the aggregate \$250 in value.

(b) Appraisal. The officer seizing property of the type described in subsection (a) shall appraise and set aside to the owner the amount of such property declared to be exempt. If the taxpayer objects at the time of the seizure to the valuation fixed by the officer making the seizure, the Secretary or his delegate shall summon three disinterested individuals who shall make the valuation.

(c) No Other Property Exempt. Notwithstanding any other law of the United States, no prop-

erty or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a).

“Section 7421.

(a) Tax. Except as provided in sections 6212(a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

“Section 7422.

(a) No Suit Prior to Filing Claim for Refund. No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.”

Government Code of Guam:

“Section 7. Authority of deputies and agents. Whenever a power is granted to, or a duty is imposed upon, a public officer, the power may be exercised or the duty may be performed by a deputy of the officer or by a person authorized, pursuant to law, by the officer, unless this code expressly provides otherwise.

“Section 5101. Department of Law. There is within the Executive Branch of the government of Guam a Department of Law. The Attorney General is the head of the Department of Law. The

Attorney General is appointed by the Governor with the consent of the Legislature.

“Section 7000. Attorney General. The Department of Law of the government of Guam shall be administered by the Attorney General of Guam, who shall be appointed by the Governor of Guam, with the advice and consent of the Legislature, and shall be subject to removal by the Governor.

“Section 7001. Department of Law, cognizance. The Department of Law shall have cognizance of all legal matters in which the government of Guam is in anywise interested. It shall have cognizance of all matters pertaining to public prosecution. For this purpose the Island Attorney, deputy Island Attorneys and all employees of the Island Attorney's office shall form the prosecution division of the Department of Law and are placed under the jurisdiction of the Attorney General.

“Section 7101. Duties. The Island Attorney is the public prosecutor and, by himself or a deputy, shall:

(1) Conduct on behalf of the government of Guam the prosecution of all offenses against the laws of Guam which are prosecuted in the District Court or the Island Court and, when directed by the Attorney General, the prosecution of those offenses which are prosecuted in the Police Court;

(2) Institute proceedings for the arrest of persons charged with or reasonably suspected of offenses under the laws of Guam, when he has information that any such offenses have been committed; and for that purpose, when not engaged in criminal proceedings in the courts, or in civil cases on behalf of the government of Guam, may attend preliminary investigations before the Di-

rector of Public Safety or before any magistrate in cases of arrest;

(3) Draw all informations, conduct on behalf of the government of Guam all civil actions in which the government is a party or interested, prosecute all recognizances forfeited in the courts and all actions for the recovery of debts, fines, penalties, and forfeitures accruing to the government of Guam;

(4) Deliver receipts for money or property received by him in his official capacity and file duplicates thereof with the Director of Finance;

(5) As soon as practical after the receipt of any money in his official capacity, turn the money over to the Director of Finance, and on the first Monday of each month file with the Director of Finance, an account, verified by his oath, of all moneys received by him in his official capacity for the Government of Guam during the preceding month;

(6) Be diligent in protecting the rights and properties of the government of Guam; and

(7) Perform such other duties as are required by law or assigned to him by the Attorney General."

Rules of the United States Court of Appeals for the Ninth Circuit:

"Rule 35. Cases Involving Constitutional Question where United States is not a Party. Notice to Court and to Attorney General. It shall be the duty of counsel who challenges the constitutionality of any Act of Congress affecting the public interest in any suit or proceeding in this court to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is

not a party, upon the filing of the record to give immediate notice in writing to this court of the existence of said question, specifying the section of the statute to be construed. In all such cases the clerk of this court shall certify such fact to the Attorney General. (See 28 U.S.C. Sec. 2403.)”

SUMMARY OF ARGUMENT.

Section 31 of the Organic Act of Guam has been interpreted in *Laguana v. Ansell*, supra, to establish a separate territorial income tax, consisting of the United States income tax laws, which are to be enforced by the officials of Guam.

The *Laguana* decision involved a suit brought for a refund of withholding taxes collected by the employer of the plaintiff and paid over to the Government of Guam. Insofar as the present appellants are seeking a refund of the taxes collected from them by distraint, the *Laguana* decision is not only a precedent on basic principles but practically on all fours.

Appellants' interpretation of Section 31 that it is merely declarative of existing law, that the United States income tax laws apply in Guam, would disregard the intent of Congress to provide that persons on Guam would pay an income tax to support the Government of Guam. Appellants' interpretation would leave in effect the exempting provisions under the United States income tax laws so that for practical purposes there would be no increase of revenue whatsoever accruing to the United States or the Government of Guam.

Section 31 is legislation by the Congress of the United States acting in its capacity as the supreme legislative authority over territories and possessions. In other words, it is a local law of Guam but enacted by the Congress of the United States instead of by the Guam Legislature.

Although appellants argue a number of constitutional points, such as violations of the Fourth and Fifth Amendments, these objections are based principally on the contention that there is no separate territorial tax and consequently appellees' acts have been without authority.

No facts showing "vagueness" and "indefiniteness" have been alleged.

The argument as to delegation of legislative authority is without foundation, since in any event Congress can give legislative authority to the executive branch of a territorial government.

The authority of the appellees to enforce the separate territorial income tax stems from the fact that under the Organic Act Section 6(b), the Governor of Guam has the obligation of enforcing the laws of the United States applicable to Guam and the laws of Guam.

This authority, with regard to the income tax, is exercised through the Director of Finance, the Appellee Taitano, and the Commissioner of Revenue and Taxation, the Appellee Mangerich.

The term "income tax laws" as used in Section 31 of necessity not only includes such provisions as pertain

to rates of tax, exemptions, deductions, and other matters pertaining to the computation of the tax, but also such other provisions of the Internal Revenue Code of the United States that pertain to the enforcement of the tax.

Consequently those provisions which pertain to the assessment and distraint are available to the tax officials of the Government of Guam.

Further, Section 7421(a), which bars any judicial proceedings to restrain the assessment or collection of the tax, necessarily applies with regard to the Guam tax. Consequently the District Court correctly ruled that it had no jurisdiction over the complaint.

In addition appellants' refusal to comply with the income tax laws bars them from asking any equitable relief on the ground of any exceptional circumstances, even if such circumstances did exist.

Similarly, since appellants filed no claim for a refund of the tax collected from them, under the provisions of Section 7422(a) of the Internal Revenue Code, the District Court had no jurisdiction insofar as the complaint asked for judgment for the refund of taxes collected.

Although appellants had filed an appeal from the denial of their motion for a temporary injunction against the enforcement of the income tax, the District Court still retained the case and it was proper for the court thereafter to entertain the motion of the appellees to dismiss the case for lack of jurisdiction.

Appellant Phelan's separate cause of action, based upon his claim that his bank accounts could not be

levied upon because he had deposited therein his disability payment checks received from the United States Veterans Administration, was also properly dismissed. Appellant Phelan had failed to identify any specific sum as being within the claimed exemption, but in any event the exemption provisions of Section 6334 of the Internal Revenue Code apply, overriding any other statutory exemptions that may exist. However, in any event, appellant Phelan has failed to allege compliance with Section 7422(a) by filing a proper claim for refund.

Appellants' objection to the appearance of members of the Attorney General's staff as counsel for the appellees is without merit and does not constitute reversible error. Although the appellees have been sued in their individual capacities, the complaint is actually based upon acts performed by them in enforcement of the separate territorial income tax. The Government of Guam certainly has a vital interest in sustaining the validity of this tax, and the acts of its officials in the enforcement thereof. Accordingly, it was proper for the Attorney General and his staff to represent the appellees.

ARGUMENT.

I.

THE FUNDAMENTAL QUESTION ON THIS APPEAL, WHETHER SECTION 31 OF THE ORGANIC ACT OF GUAM CREATES A SEPARATE TERRITORIAL INCOME TAX TO BE ENFORCED BY THE PROPER OFFICIALS OF THE GOVERNMENT OF GUAM, HAS ALREADY BEEN DECIDED BY THIS COURT IN *LAGUANA v. ANSELL* IN FAVOR OF THE APPELLEES.

Section 31 of the Organic Act states:

“The income tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam.”

The contention of the appellants is that Section 31 of the Organic Act does not create a separate territorial income tax for Guam and that the appellees, having no authority to collect any such income tax, either by United States or Guam statute, have accordingly acted illegally toward the appellants in enforcing the tax against them.

The basic issue, however, whether Section 31 creates a separate territorial income tax to be collected by the proper officials of the Government of Guam has already been ruled upon in *Laguana v. Ansell*, supra, (DC Guam, 1952) 102 F. Supp. 919, affirmed by this court, 212 F. 2d 207, writ of certiorari denied, 348 U.S. 830, 75 S.Ct. 51, 99 L. Ed. 32. It may be noted that the United States intervened as a party defendant in support of the separate tax construction.

In the *Laguana* case plaintiff Laguana sued the defendant Ansell, the then Acting Tax Commissioner and

Acting Treasurer of the Government of Guam, for a refund of the tax withheld from his wages by his employer and paid into the Treasury of Guam. Insofar as the present appellants are seeking a refund of taxes collected from them by levy on their bank accounts, the factual situation in the present case is similar to that in the *Laguana* case.

The opinion of the District Court in the *Laguana* case, 102 F. Supp. 919, states at page 920 :

“The position taken by the taxpayer is that Sec. 31 made applicable to Guam the Federal income-tax laws as such, including any provisions granting exemptions from taxation on income derived from sources within possessions of the United States, 26 U.S.C.A., Sections 251 and 252.

“The position taken by the governments is that the effect of Sec. 31 is to set up a separate income-tax system for Guam which is a duplicate of the Federal income-tax system; that the United States Congress in exercising its authority to legislate for the unincorporated territories and possessions has established a separate and distinct taxing jurisdiction which contemplates collection of the tax by territorial officials for the use and benefit of the inhabitants of the territory; that in the alternative the taxpayer cannot be heard to complain in the instant case as the tax was owing and reached the eventual source for which it was intended.

* * *

“It seems to me that it is little more than vagrant intellectual exercise to assume that in these days of great challenge the United States Congress intended by Sec. 31 to do less than impose the full burden of income taxation, measured by the Fed-

eral tax, in this unincorporated territory. Even the very limited discussion indicates that the Congress was fully aware of the fact that it was taxing those who may have previously come within one or more of the exemptions in 26 U.S.C.A., Sections 251 and 252.

“The United States Treasury Department has construed Sec. 31 as establishing a territorial tax to be administered by the officials of the Guam government and the United States supports that holding, 1951-6-13559, I.T. 4046. The taxpayer has therefore complied with the instructions of both governments in meeting his tax liability and his tax has covered into the treasury of Guam. He cannot now be heard to say that the tax should be returned to him in order that it be paid to the United States and returned to the Guam treasury from which it was taken. The case of *Stone v. White*, 301 U.S. 532, 57 S. Ct. 851, 81 L. Ed. 1265, disposes of any such contention.

“The question remains as to whether Sec. 31 imposes a Federal tax to be collected by the United States or a territorial tax to be collected by the Government of Guam.

* * *

“As the governments point out, however, in those instances when Congress has made the income-tax laws in force in the United States applicable to possessions it has in the two major instances of the Philippines and Puerto Rico directed that such tax was to be collected by the territorial governments; and the courts have held that the effect of such legislation was to levy a territorial tax. *Lawrence v. Wardell*, 9 Cir., 273 F. 406; *Robinette v. Commissioner of Internal Revenue*, 6 Cir., 139 F. 2d 285.

Later both the Philippines and Puerto Rico were given authority to adopt their own income-tax laws.

“The Naval Appropriations Act of 1921, 42 Stat. 122, 123, contained the following proviso: ‘That the income tax laws now in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in the Virgin Islands of the United States, *except that the proceeds of such taxes shall be paid into the treasuries of said islands.*’ (Italics supplied.)

“It does not appear that this proviso has been the subject of reported litigation but the United States Treasury construed it in its opinion I.T. 2946 (C.B. X14-2, 109 (1935)) as establishing separate and distinct taxing jurisdictions although their income-tax laws arose from an identical statute applicable to each. In its opinion I.T. 4046, 1951-6-13559 is similarly construed Sec. 31, *supra*, as establishing a separate territorial tax in Guam and that Section 251(a) of the Internal Revenue Code is applicable insofar as taxes due the United States are involved.

“Regardless of my initial view that Sec. 31 imposed a Federal tax to be collected by the United States, I believe that I shall add to any existing confusion by persisting in that view in the light of the position taken by the governments involved and my conviction that in any event a tax is imposed. I hold that the effect of Sec. 31 is to impose a territorial tax to be collected by the proper officials of the Government of Guam.”

This Court affirmed the decision of the District Court, 212 F. 2d 207, by stating:

“For the reasons given in the court’s opinion filed February 29, 1952, 102 F. Supp. 919, the judgment is affirmed.”

The appellants in the present appeal do not expressly ask that the *Laguana* case be overruled and not followed in the present appeal. In fact the *Laguana* decision is entirely ignored in their brief. As far as their legal arguments are concerned, appellants are proceeding as if this were a case of first instance and the *Laguana* case was never filed. They label the separate territorial tax as “legislation by the District Court of Guam acting in conjunction with the executive department of the Government of Guam” (Appellants’ Brief, 50-51).

The contention of the appellants as to the correct interpretation of Section 31 of the Organic Act of Guam is set forth in their brief as follows:

“Appellants contend that the proper construction of this statute is that this section reaffirms and continues the application to Guam of Title 26 U.S.C.A., which Title for many years has applied to Guam and which is continued in effect, subject to such future alterations as the Congress may from time to time make in its text.” (Appellants’ Brief, 59.)

Appellants fail to mention that their interpretation of Section 31 would make Section 31 a legislative non-entity in that it effected no change in existing law.

The fact is, of course, that although the United States income tax long applied to income earned in Guam, an exemption was also provided by Section 251 of the

United States Internal Revenue Code of 1939,³ under which the vast majority of taxpayers, namely those who earned more than 80 percent of their income in a possession of the United States, were permitted to avoid the United States tax.

Appellants inferentially, though not expressly, claim that this exemption still exists despite Section 31. Thus they say:

“Appellants have denied and continue to deny that they owe to the appellees *or to anyone else*, including the Government of Guam, the *sums of money or any part of said sums* which these appellees have asserted their right to levy and receive.” (Emphasis added; Appellants’ Brief, 57.)

The express purpose of Section 31, however, as shown in its legislative history recited in the *Laguana* opinion, 102 F. Supp. at pages 920-921, was to tax this income earned in Guam which previously escaped taxation under the United States income tax laws by virtue of the exemption. At the same time it was the intent to grant this additional revenue to the Government of Guam for its support. Yet appellants are in effect asserting that this purpose of Congress was not accomplished and instead Section 31 merely amounts to a gratuitous declaration of what has long been existing law.

Appellants’ brief claims that the District Court “erred gravely in distinguishing between Statutes of the United States, Statutes of Guam and such Statutes, if any exist, as may be Statutes enacted by the Congress

³Section 931 of the United States Internal Revenue Code of 1954.

as local Statutes of Guam.” (Appellants’ Brief 31, 48-50) It is claimed by the appellants that this is a basic error, resulting in much confusion.

Contrary to what the appellants claim, it is apparent that Section 31 of the Organic Act is an example of legislation enacted by the Congress of the United States as the local law of a territory or possession.

Certainly in the broad sense Section 31 of the Organic Act, and the entire Organic Act for that matter, is a United States statute, an Act of Congress, and even a Federal statute. Section 31 may even be said to impose a “federal tax” in the broad sense of the term.

However, basically, in enacting the Organic Act, Congress established the basic law of Guam, similar in some respects to a state constitution. In enacting Section 31 specifically, moreover, Congress enacted by reference as a local law of Guam the income tax laws of the United States then in force or thereafter enacted.

The nature of the Organic Act of any territory and the relation of Congress to territories is no better set forth than in *First National Bank of Brunswick v. County of Yankton*, (1880) 101 U.S. 789, 25 L. Ed. 1046:

“All territory within the jurisdiction of the United States not included in any State must, necessarily be governed by or under the authority of Congress. The territories are but political subdivisions of the outlying dominion of the United States. They bear much the same relation to the General Government that counties do to the States, and Congress may legislate for them as States do for their respective municipal organizations. The or-

ganic law of a Territory takes the place of a constitution, as the *fundamental law of the local government*. It is obligatory on and binds the territorial authorities; but Congress is supreme and, for the purposes of this department of its governmental authority, has all the powers of the People of the United States, except such as have been expressly or by implication, reserved in the prohibitions of the Constitution.

“In the Organic Act of Dakota there was no express reservation of power in Congress to amend the Acts of the territorial Legislature, but none was necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only subrogate laws of the territorial Legislatures, *but it may itself legislate directly for the local government*. It may make a void Act of the territorial legislature valid, and a valid Act void. In other words, it has full and complete legislative authority over the People of the Territories and all the departments of the territorial governments. It may do for the territories what the People, under the Constitution of the United States may do for the States.” (Emphasis added.)

The local nature of laws enacted by Congress for territories is further brought out in *United States v. Pridgeon*, (1894) 153 U.S. 48, 14 S. Ct. 746, 38 L. Ed. 631, in which the Supreme Court held that the Territory of Oklahoma and not the United States must prosecute for violation of a territorial law enacted by Congress:

“But it is suggested on behalf of the United States that the provisional and temporary adoption by Congress of the Nebraska Criminal Code for the territory of Oklahoma had the effect of making lar-

ceny or horse stealing an offense against the United State, punishable on the federal side of the courts of the territory. The supreme court of the territory has held that the Criminal Code of Nebraska, established by Congress, was to be treated as if it has been enacted by the territorial legislature, and was to be dealt with as if the crimes thereby declared were crimes, not against the United States, but against the territory. Thus, in *Ex parte Larkin*, 1 Okl. 53, 57, 25 Pac. 745, Green, C.J., says: 'It was intended by Congress that the laws of Nebraska should constitute a territorial code, as distinguished from the laws of the United States in force in the territory of Oklahoma, and that they should sustain the same relation to the courts and to the people of the territory, and to the legislative assembly, as a code of laws enacted by the legislative assembly.'

"If, as suggested by counsel for the government, section 11 of the Act of May 2, 1890, could be treated as establishing the provisional Criminal Code, therein mentioned, as a law of the United States and as creating offenses against the federal government, pending the first session and adjournment of the Oklahoma legislature, so as to make horse stealing during that time a crime not against the territorial government but against the United States, the proceeding on the federal side of the court was entirely lawful, the sentence of five years, as well as the imposition of 'hard labor' being authorized by the Nebraska Criminal Code as above quoted.

"It was certainly competent for Congress to have adopted the Criminal Code of Nebraska, so as to make horse stealing a crime against the United States in the Oklahoma Territory, just as by sec-

tion 5391, Rev. St., it has adopted the Penal Code of the states in respect to offenses committed in forts, dock yards, navy yards, and other places ceded to the United States, where the offense is not prohibited, or the punishment thereof is not specially provided for, by any law of the United States.

“But we are of the opinion that the supreme court of the territory, in *Ex parte Larkin*, has taken the proper view of the effect of section 11 of the Act of May 2, 1890, in holding that the *laws of Nebraska were adopted as a territorial code*; and, this being so, a court of the United States did not have jurisdiction of the offense of horse stealing within the territorial limits of Oklahoma under the Act of May 2, 1890, or by virtue of the Nebraska Criminal Code, provisionally adopted for the territory.” (Emphasis added)

Like Section 31 of the Organic Act of Guam, it is noted that the Pridgeon case also furnishes another example where Congress enacted a local law for a territory by incorporating by reference the law of another jurisdiction.

The Organic Act of Alaska, 23 Stat. 25, is a further example of such legislation:

“That the general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States; . . . ”

In later enacting a criminal code for Alaska, it has been held Congress enacted a local law, as indicated in *United States v. Sloan*, (DC Mont. 1945) 61 F. Supp. 439, 440:

“It does not seem to this Court that the offense charged in the indictment as perjury in an application for a marriage license, made to a United States Commissioner in Alaska, is any more an offense against the laws of the United States than was the offense of kidnapping in the Krause case. It would appear that the intent of Congress was to treat the Criminal Code of Alaska as a territorial act as distinguished from the laws of the United States. *United States v. Pidgeon*, 153 U.S. 48, 14 S.Ct. 746, 38 L.Ed. 631; *Jackson v. United States*, 9 Cir., 102 F. 473.”

So also in Hawaii, between the time of the annexation of those islands and their organization as the Territory of Hawaii, the prior laws of the Republic of Hawaii, with certain exceptions, were kept in force as local laws by enactment of a general reference statute by Congress, 31 Stat. 142. The codification of this provision, which is still in effect, is in 48 U.S.C., Section 496. The numerous cases cited in 48 U.S.C.A. indicate the validity of such legislation.

It is submitted that Section 31 of the Organic Act of Guam creates for Guam a separate territorial income tax enforceable by officials of the Government of Guam, by incorporation by reference, and the *Laguana* case, *supra*, in so holding, governs the present appeal.

II.

APPELLANTS' CONTENTION THAT APPELLEES ARE NOT AUTHORIZED TO ENFORCE THE TERRITORIAL INCOME TAX IS UNWARRANTED.

Appellants question the authority of the appellees to enforce the tax imposed by Section 31 of the Organic Act (Item 3 of complaint, R. 4; Appellants' Brief, 6, 47, 50). They suggest that the only authority of the appellees to enforce taxes is with regard to taxes enacted by the Legislature of Guam under Title XX, Government Code of Guam (Item 5 of complaint, R. 6; Appellants' Brief, 47). They say the appellees are being sued as individuals and "cannot claim the protection of their titles" (Appellants' Brief, 47, 48).

A reading of the complaint and appellants' brief, however, indicates that appellants' contention as to lack of enforcement authority is based primarily on the erroneous theory that Section 31 of the Organic Act does not create a separate territorial income tax.

Once the correctness of the decision in the *Laguana* case is demonstrated, as shown in Part I of this brief, the issue as to lack of authority to enforce the separate tax necessarily fails.

The authority to enforce the separate territorial income tax created by Section 31 is also contained in the Organic Act, Section 6(b), 48 U.S.C., Section 1422(b), which provides:

"The Governor shall have general supervision and control of all executive agencies and instrumentalities of the Government of Guam. He shall faithfully execute the laws of the United States applicable to Guam, and the laws of Guam . . . "

As pointed out in Part I hereof, Section 31 of the Organic Act, an Act of Congress, is a "law of the United States applicable to Guam."

Further, in creating a separate territorial income tax, Congress by Section 31 has enacted a local law for Guam under its power to legislate directly for territories and possessions. In this sense the territorial income tax is a "law of Guam":

First National Bank v. Yankton, supra, (1880)
101 U.S. 789, 25 L. Ed. 1046;

United States v. Pridgeon, supra, (1894) 153
U.S. 48, 14 S.Ct. 746, 38 L. Ed. 631;

Ex parte Krause, (DC ND Wash., 1915) 228 F.
547;

United States v. Sloan, supra, (DC Mont., 1945)
61 F. Supp. 439;

United States v. Wright, (DC Hawaii, 1954) 15
F.R.D. 184.

In carrying out his duties to enforce the law, the Governor can unquestionably delegate to other officials and subordinates of the executive branch of the government. This authority is recognized in the Organic Act, Section 9(b), 48 U.S.C., Section 1422c(b):

"The Governor may appoint or remove any officer whose appointment or removal is not otherwise provided for. All officers shall have such powers and duties as may be conferred or imposed on them by law or by executive regulation of the Governor not inconsistent with any law."

Since the inception of the territorial income tax under Section 31 of the Organic Act, its enforcement has been

delegated to the Director of Finance. Within the Department of Finance enforcement of the income tax has been the primary function and duty of the Commissioner of Revenue and Taxation. Affidavit of Appellee Taitano (R. 22-23).

Appellants argue further, however, that:

“ . . . if it (the alleged territorial income tax) is a local Statute, no such officers exist within the Government of Guam and these defendants are acting without any color of law and in want of any authority.” Appellants’ Brief, 6)

Of course, the tax is not a “local statute,” i.e., one enacted by the Guam Legislature. But, as previously pointed out, it is a local law of Guam, enacted by the Congress of the United States for Guam.

No local legislation by the Guam Legislature was or is required to authorize appellees, as tax officials, to enforce the territorial income tax. The delegation from the Governor is sufficient.

As stated in the *Laguana* opinion, 102 F. Supp. 919 at page 921: “When the Congress imposes a tax of this nature it intends that it shall be collected.” Accordingly, the tax as enacted must have been intended by Congress to be complete in itself, ready to be enforced by the executive authorities of Guam. It cannot be presumed Congress intended to create a vacuum—impose a tax but say no one is authorized to collect it. Consequently, no action by the Guam Legislature was necessary to put the tax into effect. Nor could any action by the Guam Legislature repeal the tax so imposed, preclude its enforcement, or limit its effect.

If Congress desired to withhold the enforcement of Section 31 as a separate territorial income tax until implementing legislation by the Guam Legislature was enacted⁴, it could have done so. In the absence of any express limitation in the statute, no such condition can be assumed. Otherwise the Guam Legislature would have a veto over the power of Congress. The express intent of Congress with regard to Section 31 could thereby be frustrated.

In *Wilson v. Kennedy*, (DC Guam, 1954) 123 F. Supp. 156, appeal presently pending in this court, No. 14593, and *Holbrook v. Taitano*, (DC Guam, 1954) 125 F. Supp. 14, the District Court has recognized the authority of the tax officials of the Government of Guam to enforce the separate tax.

Appellants' reference (Appellants' Brief, 47) to tax statutes enacted by the Guam Legislature and contained in Title XX, Government Code of Guam, is entirely irrelevant. Whatever duties appellees have under Title XX would not prevent the Governor from delegating to them additional duties with reference to the Congress-imposed territorial income tax.

⁴An example of where Congress enacted a tax statute for a possession and specifically gave the local government authority to implement it is contained in *Ricardo v. Ambrose*, (CA 3, 1954) 211 F. 2d 212, involving a real estate tax for the Virgin Islands, 49 Stat. 1372, 48 U.S.C.A., Sections 1401-1401e. It is also interesting to note that the Virgin Islands, which has had the same type of income tax law as Guam, Act of July 12, 1921, c. 44, Sec. 1, 42 Stat. 123, 48 U.S.C. 1952 Ed. Sec. 1397, has apparently never implemented this income tax provision by local legislation. Letter, Governor of Virgin Islands to Director, Office of Territories, Department of the Interior, November 16, 1954; letter, United States Attorney, Virgin Islands, to Acting Attorney General, June 3, 1954. (Reproduced in Appendix, *infra*.)

There is no question, of course, but that the complaint is directed at the appellees as individuals, but it is for acts done by them in carrying out the duties of offices held by them under the Government of Guam connected with enforcement of the territorial income tax. Appellants talk about appellees shielding themselves behind the "cloak of their official duties" and claiming the "protection of their titles," but that is merely begging the question of whether Section 31 creates a separate tax to be enforced by appellees as the tax officials of the Government of Guam.

III.

IT IS SUBMITTED THAT APPELLANTS' ARGUMENTS AS TO CONSTITUTIONALITY DO NOT WARRANT THE OVERRULING OF LAGUANA v. ANSELL AND REVERSAL OF THE PRESENT CASE.

Appellants' complaint and brief set forth a number of constitutional points (Items 7, 8, 9, and 10 of the complaint, R. 7-9; Appellants' Brief, 32-33, 35, 38, 54-60).

A. The Laguana Decision Answers Many of Appellants' Points.

Appellants' arguments as to constitutionality are not always clearly defined, nor their application clearly indicated.

Insofar as the *Laguana* decision has ruled that Section 31 establishes a separate territorial income tax to be enforced by officials of the Government of Guam, many aspects of these constitutional arguments are disposed of.

To the extent, therefore, that appellants base their constitutional arguments on the erroneous theory that Section 31 does not create a separate territorial tax, that the Government of Guam has no authority to enforce any such separate tax, that the appellees have no authority as officials of the Government of Guam to enforce any such tax but are mere usurpers and interlopers, or that the amount of the tax obligation of these appellants cannot be construed with certainty, their arguments fail. On these grounds they cannot complain that there has been a violation of the Fourth and Fifth Amendments, a taking of property without due process of law, a denial of equal protection of the laws, or violation of civil rights.

As to whether there has been any improper enforcement of the separate territorial income tax or any lack of adequate review procedures, resulting in any deprivation of appellants' constitutional rights, these matters are considered in Part IV, *infra*, in discussing the possibility of there being exceptional circumstances taking appellants' case outside the prohibition against injunctions under Section 7421(a), Internal Revenue Code of 1954, 26 U.S.C., Section 7421(a).

B. As to Delegation of Legislative Powers.

Appellants contend that the construction of Section 31 of the Organic Act as creating a separate territorial income tax is an unlawful déléation or usurpation of legislative powers and authority (Complaint, Items 7a, 7b, 9, R. 7, 8; Appellants' Brief, 33, 35).

The claim of an unlawful delegation of authority by the United States Commissioner of Internal Revenue,

as made in Item 9 of the complaint (R.8), is groundless. As previously pointed out in Part II hereof, the authority of the appellees to enforce the separate territorial income tax comes from the Governor and his authority and obligation under the Organic Act to enforce the laws of the United States applicable to Guam and the laws of Guam.

The question of delegation of legislative powers is a further challenge to the correctness of the *Laguana* decision in holding that Section 31 creates a separate tax. In applying the income-tax laws of the United States as a separate territorial Guam tax, it is at times necessary to make non-substantive changes, as for example, reading "Guam" for "United States." This necessity was pointed out and approved in *Wilson v. Kennedy*, supra, 123 F. Supp. at page 159, where the court cited a similar practice in the Virgin Islands.

It is submitted that no delegation of legislative powers is involved here. The tax officials of the Government of Guam, in enforcing the separate territorial income tax, consisting as it does of the United States income-tax laws, must of necessity read the law with substituted terminology appropriate to its function as a local tax if it is to have any meaning and if the intent of Congress is to be accomplished. This does not, of course, mean that the tax officials can act arbitrarily or according to their whims and fancies, despite appellants' remark to the contrary (Appellants' Brief, 51). The tax authorities must follow the definite standard that Congress intended, namely that Guam taxpayers shall pay

to the Government of Guam the same tax that United States taxpayers pay to the United States.

Even assuming Section 31 of the Organic Act entails a delegation of legislative power by Congress, such delegation would not be invalid since it is given to the executive branch of a possession of the United States.

In setting up governments for the possessions of the United States, Congress is not restricted to any specific form of government and is not necessarily obliged to follow the three-fold division of powers. Congress has plenary powers in governing possessions. *First National Bank v. Yankton*, supra. If it desires, it may establish a local government with a local legislature and give such legislature local legislative authority, but Congress is not obliged to do so and if it desires, Congress may give legislative authority to some other branch of the local government.

Thus for many years the Territory of Alaska had no legislature. Guam itself, before the Organic Act, was under the Department of the Navy. The Naval Governor had plenary powers—legislative and judicial as well as executive.

In establishing the territory of Oklahoma, Congress expressly vested legislative power in the Governor as well as in the legislature. Act of May 2, 1890, c. 182, Sec. 4, 26 Stat. 81, 83.

At times Congress has also vested legislative powers in the judiciary, as in the District of Columbia and Territory of Alaska:

Keller v. Potomac Electric Power Co., (1923)
261 U.S. 428, 442, 43 S. Ct. 445, 448, 67 L. Ed.
731;

In re Annexation of Slaterville, (DC Alaska
1949) 83 F. Supp. 661, 665.

It is submitted that if Section 31 of the Organic Act involves any delegation of legislative power by Congress to the executive branch of the Government of Guam, it is constitutional.

C. Appellants' Contentions that the Separate Territorial Income Tax is Unconstitutional for Being "Indefinite and Uncertain" and "Vague and Ambiguous" Present no Justiciable Questions.

Appellants say the interpretation of Section 31, as creating a separate tax is indefinite, uncertain, vague and ambiguous. It is said the sections of the Internal Revenue Code are not specifically set forth (Complaint, Item 10, R. 9; Appellants' Brief, 58).

No allegations are made, however, which indicate where and how this asserted vagueness, if such there is, has resulted in harm to these appellants.

Certainly the term "income tax laws in force in the United States" is sufficiently definite to indicate that a taxpayer subject to the Guam income tax is to pay the same tax on Guam income as a taxpayer subject to the United States would pay on United States income.

Appellants do not point to any uncertainty in any specific section affecting the assessment of the tax upon them. They allege no facts indicating it is impossible under the law to determine their net taxable income or

to compute the tax on such income. How then can they raise any constitutional question from the facts alleged that the separate territorial income fails for being indefinite, uncertain, vague and ambiguous?

D. Failure of Appellants to Comply with Rule 35 of this Court.

Although appellants have challenged the constitutionality of Section 31 of the Organic Act, as interpreted in the Laguana decision, it is pointed out that they have failed to comply with Rule 35 of this Court:

“Notice to Court and to Attorney General.

It shall be the duty of counsel who challenges the constitutionality of any Act of Congress affecting the public interest in any suit or proceeding in this court to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, upon the filing of the record to give immediate notice in writing to this court of the existence of said question, specifying the section of the statute to be construed. In all such cases the clerk of this court shall certify such fact to the Attorney General. (See 28 U.S.C. Sec. 2403.)”

IV.

SINCE SECTION 31 OF THE ORGANIC ACT CREATES A SEPARATE TERRITORIAL INCOME TAX, THE DISTRICT COURT PROPERLY DISMISSED APPELLANTS' COMPLAINT ASKING FOR AN INJUNCTION AGAINST ENFORCEMENT OF THE TAX BY VIRTUE OF SECTION 7421, INTERNAL REVENUE CODE OF 1954.

The District Court dismissed the complaint, on appellees' motion, on the ground it had no jurisdiction un-

der Section 7421(a) of the Internal Revenue Code. It is submitted this ruling was correct.

A. The Term "Income Tax Laws" Includes Section 7421(a).

The separate territorial income tax created by Section 31 of the Organic Act consists of the "income-tax laws in force in the United States of America and those which may hereafter be enacted."

Section 7421(a)⁵, Internal Revenue Code of 1954, 26 U.S.C., Section 7421(a), provides:

"(a) Tax. Except as provided in sections 6212 (a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

Appellants contend (Appellants' Brief, 30, 37) that this section has no application, apparently on the erroneous ground that Section 31 does not create a separate tax and therefore Section 7421(a) applies only to United States taxes (Appellants' Brief, 37). It is further indicated (Appellants' Brief, 30) that 28 U.S.C., Section 1341, apparently applies to Guam but it is claimed that appellants are within the exception therein provided.

However, if Section 7421(a) is a part of the "income-tax laws" referred to in Section 31 of the Organic Act, it precludes appellants' suit for injunction—barring unusual circumstances as will be discussed subsequent-

⁵Section 7421(a) of the Internal Revenue Code of 1954, effective August 16, 1954, is successor to Section 3653(a) of the Internal Revenue Code of 1939. Appellants refer to latter in their brief (Appellants' Brief, 37, 38).

ly. Any question as to Section 1341 of Title 28 is then not in issue.

The term “income-tax laws” necessarily cannot be limited to the provisions pertaining to tax rates, exemptions, and deductions, but must be taken to include the various enforcement provisions. Without enforcement provisions the tax would be a hollow shell without substance.

This principle is implied in the *Laguana* decision when it states that the separate territorial income tax created by Section 31 is “to be collected by the proper officials of the Government of Guam.”

In *Wilson v. Kennedy*, supra, (DC Guam, 1954) 123 F. Supp. 156, appeal pending in this Court, No. 14593, the District Court in granting a summary judgment in favor of the defendants, officials of the government of Guam, held specifically that Section 31 extended to them the enforcement powers under the United States Internal Revenue Code. It is stated in the Court’s opinion, at page 158:

“The defendants are sued as individuals, but they are the former Commissioner of Revenue and Taxation for Guam, and the present Governor, Attorney General, and Director of Finance for Guam, respectively. In their official capacities they are charged with responsibility for tax collection, but there is no specific statute enacted by the Guam Legislature or by the United States Congress which authorizes them to levy and collect income taxes. Such authority, if it exists, must flow by necessary implication from the law creating the tax and the logical assumption that the United States Congress

intended that the tax should be collected and used for the benefit of the Government of Guam. The pertinent provisions are Sections 30 and 31 of the Organic Act of Guam.”

The District Court then concludes, at pages 159 and 160:

“The following principles appear to be basic:

1. Section 31 of the Organic Act of Guam imposes a territorial income tax to be paid to and collected by the proper officials of the Government of Guam.

2. The Director of Finance is authorized as the tax collector in Guam to enforce and receive such taxes by himself or his appointees.

* * *

4. The applicable provisions in the United States Revenue Code to enforce the payment of the territorial income tax are ‘income tax laws’ within the meaning of Section 31 and are available to the Director of Finance or those authorized by him, subject to those non-substantive changes in nomenclature as are necessary to avoid confusion as to the taxing jurisdiction involved.”

In *Holbrook v. Taitano*, supra, (DC Guam, 1954) 125 F. Supp. 14, the plaintiff sought to enjoin the defendants, tax officials of the Government of Guam, from enforcing the tax against him, the basic claim again being that Section 31 did not create a separate territorial tax. In dismissing the complaint for lack of jurisdiction, the court held that the ban on suits to enjoin collection of taxes, contained in the United States Internal Revenue Code applied, saying, at page 17:

“We are dealing with a tax imposed by the United States Congress and the District Court of Guam is created by that Congress. Both Section 7421 of the 1954 Internal Revenue Code, 26 U.S.C.A., and Section 3653 of Title 26 of the 1939 Code, with certain exceptions, prohibit any court from maintaining a suit for the purpose of restraining the assessment or collection of any tax.”

A notice of appeal was filed in the *Holbrook* case but was subsequently dismissed by the appellant before the record reached this court.

The creation of a separate territorial income tax for Guam by the enactment by Congress of Section 31 is an example of legislation incorporating existing laws by reference which Congress has resorted to on other occasions, as mentioned in Part I hereof, pages 28-29.

The rule for interpretation of statutes enacted by reference is set forth in *Engel v. Davenport*, (1926) 271 U.S. 33, 46 S. Ct. 410, 70 L. Ed. 813:

“The adoption of an earlier statute by reference makes it as much a part of the later act as though it had been incorporated at full length. *Kendall v. United States*, 12 Pet. 524, 625, 9 L. Ed. 1181; *In re Heath*, 12 S. Ct. 615, 144 U.S. 92, 94, 36 L. Ed. 358; *Interstate Railway v. Massachusetts*, 28 S. Ct. 26, 207 U.S. 79, 85, 52 L. Ed. 111, 12 Ann. Cas. 355. *It brings into the later act ‘all that is fairly covered by the reference.’* *Panama Railroad Case*, 44 S. Ct. 391, 264 U. S. 392; *that is to say, all the provisions of the former act which, from the nature of the subject-matter, are applicable to the later act.*” (Emphasis added)

Appellants assert that 28 U.S.C., Section 1341, is applicable rather than Section 7421(a) of the Internal Revenue Code. However, if Section 1341 applies at all it is merely cumulative to Section 7421(a) in view of the fact that Section 7421(a) is a part of the "income tax laws" of the United States referred to in Section 31.

Section 1341 clearly applies to state-enacted taxes. It is scarcely appropriate to a tax enacted by Congress for a territory, such as the Guam territorial income tax.

From the foregoing it is submitted that Section 7421(a) of the Internal Revenue Code of 1954, 26 U.S.C.A., Section 7421(a) is included in the term "income tax laws," referred to in Section 31 of the Organic Act and the District Court consequently had no jurisdiction to entertain appellants' suit for injunction.

B. Circumstances in Present Case do not Warrant Invocation of Equity to Grant Appellants' Request for Injunctive Relief.

It has been held that Section 7421(a), Internal Revenue Code, does not deprive a court of its equity jurisdiction to enjoin where there are exceptional circumstances.

Hill v. Wallace, (1952) 259 U.S. 44, 42 S.Ct. 453, 66 L. Ed. 822;

Miller v. Standard Nut Margarine Co. of Florida, (1932) 284 U.S. 498, 52 S.Ct. 260, 76 L. Ed. 422.

The District Court recognized this principle in reaching its decision:

"Now certainly if you are being discriminated against, or if the collector is attempting to ruin you financially and you have done everything to pro-

tect yourself, you are entitled to the intervention of the Court . . . ” (R. 30)

The District Court held, however, both with regard to appellants' motion for preliminary injunction (R. 26-27) and on appellees' motion to dismiss (R. 31), that on the same basis as in the *Holbrook* case relief would be denied in the absence of any showing that appellants themselves had conformed with the income tax law:

“Now nowhere in all of this litigation except the Laguna case do the plaintiffs come into court and say, ‘We have done everything administratively that we are required to do and yet we are being oppressed by the tax officials of the Government of Guam.’ In every instance they say, ‘We defy those officials and we defy that government and we contend that we are not responsible to that government to assist in its support as indicated and required by the United States Congress.’ Certainly, as the Court pointed out in the *Holbrook* case and other cases, its assistance is not available to plaintiffs who insist upon the maintenance of that position. The assistance of the Court is available always if there is an abuse of discretion on the part of the collector, if oppression is such that the individual has no place else to turn, but in the present motion for temporary injunction the affidavits are completely insufficient to justify the intervention of the Court because the affiants do not show that they have performed the necessary administrative action to entitle them to show further that the collector and other government officials are acting arbitrarily. Until that foundation is laid and until the plaintiffs comply with the law, file their returns, make their payments and then object to any abuses,

the Court is definitely of the view that it has no right to intervene. The motion for temporary injunction is therefore denied.” (R. 26-27)

“The law doesn’t say that, so the Court will make the same ruling in this case as it did in the Holbrook case. With the absence of any showing that the plaintiff has complied with the local income tax law by filing returns and paying his tax, the Court is without jurisdiction and the case is dismissed.” R. 31)

The pertinent statements in *Holbrook v. Taitano*, supra, to which the court has referred, are indicated at 125 F. Supp. at page 17:

“If, as this court held in *Wilson v. Kennedy*, the applicable provisions of the United States Revenue Code to enforce the payment of the territorial income tax are available to these defendants, the question necessarily arises as to whether this court has any jurisdiction under the allegations of the complaint. It is not contended by the plaintiff that these defendants have done or are doing anything not authorized by the Internal Revenue Code of the United States, nor is it questioned that they rely upon such Code for their authority to enforce the income tax created by Section 31 of the Organic Act of Guam rather than upon any legislation adopted by the Guam Legislature. This is not the type of case considered by the court in *Sanders v. Andrews*, D.C., 121 F. Supp. 584, where the court enjoined the enforcement of jeopardy assessments because such assessments were arbitrary and capricious under the circumstances of that case. *There the court held that the taxpayer had done everything he could reasonably be expected to do to fulfill his*

tax obligation. In the instant case the taxpayer plaintiff has failed or refused to recognize any authority on the part of the Government of Guam to collect the tax imposed by Section 31.

“We are dealing with a tax imposed by the United States Congress and the District Court of Guam is a court created by that Congress. Both Section 7421 of the 1954 Internal Revenue Code, 26 U.S.C.A., and Section 3653 of Title 26 of the 1939 Code, with certain exceptions, prohibit any court from maintaining a suit for the purpose of restraining the assessment or collection of any tax. The aggrieved taxpayer is left to his administrative remedies unless equity requires court intervention to prevent arbitrary and capricious action. The Government of Guam must obtain revenue to operate. In establishing it, the United States Congress in the Organic Act of Guam provided how that revenue, in part, should be obtained. This court has no no jurisdiction to intervene when the taxpayer plaintiff is in open defiance of the Government of Guam as regards its authority to require him to pay income taxes on income earned in Guam.” (Emphasis added)

The primary purpose of Section 7421(a) and its predecessors has long been recognized as being to prohibit suits which will interfere with the assessment and collection of tax revenue necessary to the maintenance of government:

State Railroad Tax Cases, (1876) 92 U.S. 575, 613, 23 L. Ed. 663, 673;
Cadwalader v. Sturgess, (CA 3, 1924) 297 F. 73, 75;

Voss v. Hinds, (DC WD Okla, 1953) 111 F. Supp. 679, 681.

The courts have held that Section 7421(a), or its predecessors, applies even where the assessment is alleged to be illegal and even where the tax statute itself is alleged to be unconstitutional:

Dodge v. Osborn, (1916) 240 U.S. 118, 36 S.Ct. 275, 60 L. Ed 557;

Bailey v. George, (1922) 259 U.S. 16, 42 S.Ct. 419, 66 L. Ed. 816;

Graham v. DuPont, (1923) 262 U.S. 234, 43 S.Ct. 567, 67 L. Ed. 965;

Harvey v. Early, (CA 4, 1947) 160 F. 2d 836;

Dyer v. Gallagher, (CA 6, 1953) 203 F. 2d 477;

Robique v. Lambert, (DC ED La., 1953) 114 F. Supp. 305, affirmed (CA 5, 1954) 214 F. 2d 3.

A study of these cases indicates that the situation must be truly extraordinary before the "exceptional circumstance" doctrine will apply.

In *Bailey v. George*, supra, (1922) 259 U.S. 16, 36 S.Ct. 419, 66 L. Ed. 816, the district court had enjoined the enforcement of the Child Labor Tax Law, a federal tax statute. In reversing, the Supreme Court held:

"An examination of the bill shows no other ground for equitable relief than as stated in the order. The bill does aver 'that these your petitioners have exhausted all legal remedies and it is necessary for them to be given equitable relief in the premises;' but there are not specific facts set forth sustaining this mere legal conclusion. Section 3224, R. S. (Comp. St. 5947), provides that 'no suit for the purpose of restraining the assessment or col-

lection of any tax shall be maintained in any court.' The averment that a taxing statute is unconstitutional does not take this case out of the section. There must be some extraordinary and exceptional circumstance not here averred or shown to make the provisions of the section inapplicable."

In *Dyer v. Gallagher*, supra, (CA 6, 1953), 203 F. 2d 477, another action to restrain which was dismissed on motion under Section 3653 of the Internal Revenue Code of 1939, it was alleged:

"The complaint alleges that a jeopardy assessment of income tax deficiencies for the years in question had been made against her and her husband in the amount of \$84,065.55 which had been listed to the Collector for collection; that she is unable to furnish the required bond to stay collection; that the Collector will seize and sell her property without notice or demand; that the collection will cause her irreparable injury; that she has no remedy at law; that the jeopardy assessment 'is a void and arbitrary action, made without warrant or authority of law, in violation of plaintiff's constitutional rights and privileges to due process of law, and was a mistake and error of law, and is not supported or sustainable by any substantial, credible, competent, relevant or material evidence;' and that the appellee is exceeding his authority in proceeding to collect the assessment by seizure and sale."

The court held:

"In any event the alleged unconstitutionality of the taxing statute is not sufficient grounds to justify injunctive relief. *Dodge v. Osborn*, 240 U.S. 118, 36 S.Ct. 275, 60 L. Ed. 557; *Bailey v. George*, 259 U.S.

16, 42 S.Ct. 419, 66 L. Ed. 816. It is also well settled that injunctive relief will not be granted on the ground, without more, that the tax has been erroneously or illegally assessed. *Snyder v. Marks*, 3 S.Ct. 157, 27 L. Ed. 901, 109 U.S. 189; *Graham v. DuPont*, 262 U.S. 234, 43 S.Ct. 567, 67 L. Ed. 965; *Reams v. Vrooman-Fehn Printing Co.*, 6 Cir., 140 F. 2d 237, 240. In our opinion, the extraordinary and exceptional circumstances justifying injunctive relief are not shown to exist by the complaint in this action. See *Reams v. Vrooman-Fehn Printing Co.*, *supra*; *Ohio State Nurses' Ass'n v. Busey*, 6 Cir., 120 F. 2d 11, the first of which cases points out the exceptional circumstances which authorized injunctive relief in *Midwest Haulers v. Brady*, *supra*, and *John M. Hirst & Co. v. Gentsch*, *supra*, which are not present in a case like the present one. In addition, it was pointed out in both of those cases that the complaint showed that the tax which the Collector was seeking to enforce was probably not validly assessed and was not legally due. The complaint in the present case alleges no facts which sustain the contention that the jeopardy assessment was arbitrary, without authority, unsupported by competent evidence, and a mistake and error of law. It states that the assessment is illegal, without disclosing in any way the facts on which the assessment was based or in what way and why the ruling of the Commissioner was erroneous. Such allegations in the petition are mere conclusions and are not sufficient to state a cause of action on that ground. *Straus v. Foxworth*, 231 U.S. 162, 168, 34 S.Ct. 42, 58 L. Ed. 168; *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 184-185, 56 S.Ct. 159, 80 L. Ed. 138; *Sheridan-Wyoming Coal Co. v. Krug*, 83 U.S. App. D.C. 162, 168 F. 2d 557, 558-

559; *Marranzano v. Riggs National Bank*, 87 U.S. App. D.C. 195, 184 F. 2d 349, 351; *Billings Utility Co. v. Advisory Committee Board of Governors*, 8 Cir., 135 F. 2d 108; *Cohen v. Beneficial Industrial Loan Corp.*, D.C. N.J., 69 F. Supp. 297, 301-302.”

In *Robique v. Lambert*, *supra*, (DC ED La. 1953), 114 F. Supp. 305, the complaint was dismissed on motion notwithstanding the complainants contended:

“ . . . that the assessment of the high tax, and demand for payment thereof under threat of seizure is punitive, arbitrary, capricious and discriminatory, and in violation of the Due Process Clause of the United States Constitution, Amend. 5. They allege want of an adequate remedy at law, and irreparable injury, and pray for injunctive relief. Respondent has moved to dismiss the complaints on the ground that because of the provisions of Section 3653, Internal Revenue Code, 26 U.S.C.A., Sec. 3653, this Court is without jurisdiction. . . . Briefly, the exceptional circumstances alleged to exist here are that complainants are unable to pay the tax demanded, and that the action of respondent will give rise to a multiplicity of suits in that complainants will be required to file several suits to obtain refund of such taxes as may unlawfully be collected from them. Although complainants plead their inability to pay the tax it is plain from the pleadings that what they mean is that payment of the tax will be a hardship . . . Allegations of hardship to pay taxes are not sufficient to confer jurisdiction on this Court. *State of California v. Latimer*, 305 U.S. 255, 262, 59 S.Ct. 166, 83 L. Ed. 159; *Reams v. Vrooman-Fehn Printing Co.*, 6 Cir., 140 F. 2d 237 . . . The remedy of the complainants

is to pay the taxes, apply for refund, and if refund is denied, sue the Director to recover the taxes. *Larson, Collector of Internal Revenue v. House*, 5 Cir., 1940, 112 F. 2d 930.”

Appellants claim the taxes assessed against them are in excess of their net worth (R. 15, 18), but as indicated in *Robique v. Lambert*, supra, allegations of hardship to pay taxes are not sufficient to confer jurisdiction. Other cases so holding:

State of California v. Latimer, (1938) 305 U.S. 255, 59 S.Ct. 166, 83 L. Ed. 159;

Reams v. Vrooman-Fehn Printing Co., (CA 6, 1944) 140 F. 2d 237;

Milliken v. Gill, (CA 4, 1954) 211 F. 2d 869.

It is a maxim of equity that he who seeks equitable relief must in turn do equity. Equitable relief by way of injunction against the enforcement of taxes has been denied in many cases where the conduct of the party seeking such equitable relief has not itself been deemed equitable by the courts.

The District Court stressed the fact that the appellants, as the plaintiff in *Holbrook v. Taitano*, supra, have been in open defiance of the Government of Guam with regard to enforcement of the territorial income tax held to have been established by Section 31 by the decision in the *Laguana* case. They themselves admit that they have failed to file income tax returns (Appellants' Brief, 39), and as indicated in the affidavit of the Appellee Mangerich, the Commissioner of Revenue and Taxation, they have denied access to their books and records and failed to honor summons issued by the

Commissioner of Revenue and Taxation to appear before him (R. 20-22-A).

Thus in *State Railroad Tax Cases*, supra, (1876) 92 U.S. 575, 616, 23 L. Ed. 663, 674, it is stated:

“But there is another principle of equitable jurisprudence which forbids in these cases the interference of a court of chancery in favor of complainants. It is that universal rule which requires that he who seeks equity at the hands of the court must first do equity . . . Before complainants seek the aid of the court to be relieved of the excessive tax, they should pay what is due. Before they ask equitable relief, they should do that justice which is necessary to enable the court to hear them. It is a profitable thing for corporations or individuals whose taxes are very large to obtain a preliminary injunction as to all their taxes, contest the case through several years’ litigation, and when in the end it is found that but a small part of the tax should be permanently enjoined, submit to pay the balance. This is not equity. It is in direct violation of the first principles of equity jurisdiction. It is not sufficient to say in the bill, that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted.”

German National Bank of Chicago v. Kimball, (1881) 103 U.S. 732, 733, 26 L. Ed. 469:

“The allegations are pretty full that the assessments are partial, unequal and unjust, and do not result in the uniformity of taxation which the Constitution of Illinois requires. But we think there

are two fatal objections to the bill. The first of these is that there is no offer to pay any sum as the tax which the shares of the Bank ought to pay. We have announced more than once that it is the established rule of this court that no one can be permitted to go into a court of equity to enjoin the collection of a tax until he has shown himself entitled to the aid of the court by paying so much of the tax assessed against him as it can be plainly seen he ought to pay. That he shall not be permitted, because his tax is in excess of what is just and lawful, to screen himself from paying any tax at all until the precise amount which he ought to pay is ascertained by a court of equity.”

Northern Pac. R. Co. v. Clark, (1894) 153 U.S. 252, 272, 14 S.Ct. 809, 816, 38 L. Ed. 706:

“Being liable to pay either the percentage on gross earnings in accordance with the provisions of the act of 1889, or the tax upon its lands, as other property of like character was assessed, the appellant was not entitled to any relief in a court of equity by injunction without payment or tender of what was due under one or the other of these modes of taxation.

“In *State Railroad Tax Cases*, 92 U.S. 575, 616, 617, the rule is established that before an injunction will be granted in such cases as the present, a party must pay or tender what can be seen to be due on the face of the bill, and, speaking for the court in that case, Mr. Justice Miller said that the duty of making such a tender or payment before any injunction will be allowed is laid down ‘as a rule to govern the courts of the United States in their action in such cases.’ This rule was repeated in

Bank v. Kimball, 103 U.S. 732, 733, where it was treated as a fatal objection to the bill that there was no offer to pay any sum as a tax which the party ought to pay, and, again speaking for this court, Mr. Justice Miller there said: 'We have announced more than once that it is the established rule of this court that no one can be permitted to go into a court of equity to enjoin the collection of a tax until he has shown himself entitled to the aid of the court by paying so much of the tax assessed against him as it can be plainly seen he ought to pay,' etc.'"

It is submitted that in appellants' case there are no special circumstances to justify the granting of an injunction.

C. Appellants Have Adequate Procedures Available to Them and Have not Exhausted Their Administrative Remedies.

If there were no methods available to appellants to litigate the question as to whether Section 31 of the Organic Act creates a separate territorial income tax, and also whether such tax has been properly enforced with regard to their own income, the situation might well be within the exceptional circumstances under which a court of equity will take jurisdiction notwithstanding Section 7421(a) of the Internal Revenue Code.

Appellants, however, have not followed the administrative possibilities open to them, within the tax law, and instead say that such tax law, though recognized by the *Laguana* decision, has no valid existence.

With regard to any claim for refund due appellants for any tax improperly collected from them, as shown

in Part V hereof, *infra*, pages 61-63, appellants have failed to file a claim as required by Section 7422(a) of the Internal Revenue Code.

If such a claim were filed, a suit for refund could then be instituted against the Commissioner of Revenue and Taxation, or, it may be possible, against the Government of Guam itself. It may be that just as a suit for refund of the United States income tax can be maintained against the United States under 28 U.S.C., Section 1346, so, also, such a suit may be maintained against the Government of Guam by inference on the theory that such waiver of immunity for the territory is necessarily included by the enactment of Section 31 of the Organic Act.

By creating the separate territorial income tax, Congress necessarily intended to give the taxpayer similar rights as a United States taxpayer under the United States income tax, which would include a right to sue for refund.⁶

The most glaring omission on appellants' part to resort to administrative procedures is their failure to file income tax returns. How then can they complain against the correctness of the amount of the Tax Commissioner's assessment when they refuse to furnish the correct information by filing returns?

The same may be said with regard to their failure to honor the Commissioner's summons to produce their books and records.

⁶This is not contrary to *Crain v. Government of Guam*, (DC Guam, 1951) 97 F. Supp. 433, affirmed by this Court, (1952) 195 F. 2d 414, which was an action for a declaratory judgment.

Certainly it was to cover such circumstances that Section 7421(a) and its predecessors were enacted, and also, as mentioned *supra*, page 52-55, courts have denied equitable relief where the complaining party has not himself done equity.

Appellants mention the lack of a "tax court" (Appellants' Brief, 51). It must be conceded that the Government of Guam has not expressly established a Guam Tax Court, if that is what appellants refer to.

It is possible, however, that the United States Tax Court would have jurisdiction to hear an appeal from a determination by the Commissioner as to tax liability.

So also the District Court of Guam, in its capacity as the court of general jurisdiction over all local cases, may well have jurisdiction under the circumstances. Section 22(a), Organic Act of Guam; 48 U.S.C., Section 1424.⁷

A review of a proposed tax assessment prior to liability to pay the tax is not, however, as a general principle a requirement for due process. The tax statutes are legion in various jurisdictions where the only remedy a complaining taxpayer has is to pay the assessment made administratively and then file suit for refund.

This was true with regard to the United States income tax until the United States Tax Court, or Board of Tax Appeals as it was then called, was established in 1924.

⁷" . . . The District Court of Guam shall have in all causes arising under the laws of the United States, the jurisdiction of a district court of the United States as such court is defined in Section 451 of Title 28, United States Code, and shall have original jurisdiction in all other causes in Guam, jurisdiction over which has not been transferred by the legislature to other court or courts established by it, . . ."

Even now not all federal taxes may be appealed to the Tax Court. Its jurisdiction is limited principally to income, estate and gift taxes. For many federal taxes the taxpayer's only remedy is to pay and sue for refund, as shown, for example, in *Robique v. Lambert*, supra.

Even if the Government of Guam has been remiss in not establishing a tax court comparable to the United States Tax Court, that would not, of course, mean that the *Laguana* decision should be overruled and appellants' theory of Section 31 be adopted.

There would still be a separate territorial income tax. At the very most the assessments against appellants would be questionable as such but appellant would still be liable for the tax actually owed by them. They would not be entitled to an injunction as long as they themselves refused to obey the tax law. They would not be entitled to sue for a refund for the tax collected from them without filing a proper claim.

D. Appellants' Motion for Temporary Injunction was Properly Denied and Appellees' Motion to Dismiss was Properly Granted Even Though the Facts Well Pleaded Were Admitted for the Sake of the Motion; Answers to Miscellaneous Points.

Appellants contend it was error to deny their motion for a temporary injunction and grant appellees' motion to dismiss in that it denied appellants their day in court and disregarded the fundamental rule that upon a motion to dismiss all allegations of the complaint stand admitted (Appellants' Brief, 35-41, 43-46, 56).

But as pointed out previously, the underlying basic point is whether Section 31 creates a separate territorial

tax. This is a *question of law* and could be, and properly was, decided on the motion to dismiss.

Were the appellees, as tax officials of the Government of Guam, authorized to collect that tax? Granting there is a separate tax, it is again a question of law as to the authority of the Governor of Guam, and the appellees as his subordinates, to enforce the tax.

These questions of law have already been fully discussed, *supra*, in Part I, pages 19-29 and Part II, pages 30-34.

As shown in this Part IV, the District Court had no jurisdiction to enjoin enforcement of the tax by virtue of Section 7421(a) of the Internal Revenue Code. The temporary injunction was thus properly denied, and appellees' motion to dismiss was properly granted.

Many of the statements of the complaint actually are no more than appellants' interpretation of the statutes involved and are mere conclusions of law.

As to the facts alleged, these constitute acts performed by appellees in enforcing the separate tax. These acts are certainly conceded. But again, to the extent the complaint alleges that these acts are violations of the Constitution, Organic Act, and various statutes, the allegations are mere conclusions of law.

With regard to their own motion for a temporary injunction, appellants argue:

“As upon a motion to dismiss, it is presumed that likewise the uncontroverted allegations of fact contained in the complaint and supported by the affidavits of both appellants must and should be for

the purposes of the motion be taken as true.” (Appellants’ Brief, 42.)

In other words, appellants present the rather startling doctrine that when a plaintiff files a motion, the allegations in his own complaint must be taken as true!

No authorities are cited.

It is submitted that the granting of a temporary injunction lies within the sound discretion of the court.

It is submitted the court properly denied the temporary injunction. The same reasons for the granting of appellees’ motion to dismiss also sustain the denial of the temporary injunction.

Appellants, however, say (Appellants’ Brief, 42-43) that at the hearing on the temporary injunction on November 12, 1954, the court

“was obviously aware of the contents of this (appellees’) motion to dismiss as he commented upon the contents and supporting affidavit familiarly, although he obviously had no opportunity to review either the motion or the affidavit after it was filed and before the hearing on that morning.”

This would appear to be an innuendo, at the very least, that counsel for appellees had informed the court privately of the context of the proposed motion or had furnished the court a copy before it was filed.

However, appellants’ charges are unwarranted. A reading of the record of the hearing (R. 25-28) clearly shows the court’s ruling was based on appellants’ failure to allege compliance with the separate income tax law and their challenge to the existence of such a law.

Moreover, it is not improbable that appellees' motion and supporting affidavit, filed earlier that morning, had already been placed in the case file by the clerk and had been read by the court.

Appellants also argue that appellants' motion to dismiss was granted on hearsay and private knowledge (Appellants' Brief, 46) and add:

“This is amply borne out by the failure of counsel for appellees to argue their motion and the extensive argument appearing in the record in behalf of appellees made by the court.”

As to failure of appellees' counsel to argue, it may be stated that counsel had some days previously filed a seven-page memorandum of authorities. (This is not included in the record.) The court was thus fully aware of appellees' position.



V.

SINCE SECTION 31 OF THE ORGANIC ACT CREATES A SEPARATE TERRITORIAL INCOME TAX, THE DISTRICT COURT ALSO HAD NO JURISDICTION INSOFAR AS THE APPELLANTS SEEK A REFUND OF TAXES COLLECTED, BY VIRTUE OF APPELLANTS' FAILURE TO FILE A CLAIM AS REQUIRED BY SECTION 7422(a) INTERNAL REVENUE CODE OF 1954.

In addition to not having jurisdiction over the subject matter of the action under Section 7421(a) to grant an injunction against the enforcement of the tax, insofar as the appellants seek in their complaint a refund for the taxes collected from them, the court also did not have jurisdiction.

Section 7422(a), Internal Revenue Code of 1954, provides:

“(a) No Suit Prior to Filing Claim for Refund. No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.”

This section for the same reasons as shown in Part IV hereof with regard to Section 7421(a) must be regarded as part of the “income tax laws” which constitute the separate Guam territorial income tax created under Section 31 of the Organic Act. Section 7422(a) merely provides the orderly administrative procedure which is a necessary condition precedent to the filing of a suit for refund of the tax. The predecessor to this section, Section 3772(a) of the Internal Revenue Code of 1939 was properly complied with by the plaintiff Laguana in *Laguana v. Ansell*, 102 F. Supp. at 920.

The appellants in the present case, however, have failed to allege compliance with the conditions required by the statute. In fact, they have not filed any such claim for refund, as indicated in paragraph 9 of the affidavit of Appellee Mangerich (R. 22-23).

This failure to file a claim for refund before instituting a suit for refund is jurisdictional. An action will not lie in the absence of filing a claim for refund:

Rock Island, A. & L. R. Co. v. United States,
 (1920) 254 U.S. 141, 41 S.Ct. 55, 65 L. Ed. 188;
United States v. Felt & Tarrant Mfg. Co., (1931)
 283 U.S. 269, 51 S.Ct. 376, 75 L. Ed. 1025;
R. J. Reynolds Tobacco Co. v. Robertson, (CA
 4, 1936) 80 F. 2d 966;
Kales v. United States (CA 3, 1940) 115 F. 2d
 497, affirmed (1941) 314 U.S. 186, 62 S.Ct.
 214, 86 L. Ed. 132;
Harvey v. Early, (CA 4, 1947), 160 F. 2d 836.

VI.

THE DISTRICT COURT CONTINUED TO HAVE JURISDICTION TO
 HEAR AND GRANT APPELLEES' MOTION AFTER APPEL-
 LANTS FILED NOTICE OF APPEAL FOLLOWING DENIAL OF
 PRELIMINARY INJUNCTION.

Appellants contend that their appeal from the denial
 by the District Court of their motion for temporary
 injunction removed the entire case from the District
 Court. Consequently, they argue, the District Court
 could not entertain the motion of the appellees to dis-
 miss the complaint (Appellants' Brief, 30, 39-40, 43).
 No authorities are cited.

It is true, of course, that appellants had the right to
 appeal the interlocutory order of the court denying the
 temporary injunction. 28 U.S.C., Section 1292. But this
 did not remove the entire case to this court.

In construing an earlier version of 28 U.S.C., Section
 1292, the Supreme Court said in *Ex parte National*

Enameling and Stamping Company, (1906) 201 U.S. 156, 26 S.Ct. 404, 406, 50 L. Ed. 707:

“Obviously that which is contemplated is a review of the interlocutory order, and of that only. It was not intended that the cause as a whole should be transferred to the appellate court prior to the final decree. The case, except for the hearing on the appeal from the interlocutory order, is to proceed in the lower court as though no such appeal had been taken, unless otherwise specially ordered.”

Additional cases:

Cuyler v. Atlantic & N.C.R. Co., (CC ED NC, (1904) 132 F. 568;

Foot v. Parsons Non-Skid Co., (CA 6, 1912) 196 F. 951.

It is submitted that the District Court continued to have jurisdiction after notice of appeal was filed to hear and grant appellees' motion to dismiss, following denial of appellants' motion for preliminary injunction.

VII.

APPELLANT PHELAN'S SEPARATE CAUSE OF ACTION WAS PROPERLY DISMISSED BY THE DISTRICT COURT.

In the complaint (R. 11) appellant Phelan sets forth a separate cause of action in his own behalf in which he states he is a permanently disabled veteran of World War II receiving disability compensation from the United States Veterans Administration, that checks for

such compensation have been deposited in the accounts, the proceeds of which were illegally distrained upon by the appellees, and that such compensation is absolutely exempt from any levy, attachment, or distraint.

This separate cause of action is apparently added as an additional ground for entitling the appellant Phelan to a judgment for the refund prayed for.

Assuming for the sake of argument that the compensation received by the appellant is exempt as he claims, that alone would not make illegal the distraint upon the bank accounts in which the compensation checks were deposited. The mere fact that the appellant from time to time deposited individual checks of the nature described into his three accounts, would not, of course, make the entire amounts in such accounts exempt from execution. If there is any exemption at all, it would be up to the claimant at least to identify what portions of the named accounts constitute his disability compensation. This he has failed to allege. It cannot be claimed that the entire balance necessarily represents only disability compensation and not other sources of income.

In any event, however, if there is any merit to appellant's contention that portions, or even all of the deposits in his accounts, constitute disability compensation payments, it was incumbent upon him, following the distraint, to file a proper claim with the Commissioner of Revenue and Taxation for a refund in accordance with Section 7422(a), Internal Revenue Code of 1954, prior to instituting suit, as previously discussed in Part V hereof.

It is questionable, however, whether as a matter of law Appellant Phelan's disability compensation payments are exempt from execution levied in the payment of his income tax liability.

He cites 38 U.S.C.A., Section 454a, as authority for the claimed exemption. However, this entire chapter, Chapter 10, refers only to veterans of World War I, as indicated in Section 424. Appellant has not cited by what authority the exemption section was extended to veterans of World War II.

In addition the exemption in Section 690, subparagraph 13, Guam Code of Civil Procedure, which is also quoted by the appellant, exempts "money" received as "a pension from the United States Government." Appellant cites no authority to sustain his contention that his "disability compensation" comes under the term "pension from the United States Government."

In any event, however, the provisions cited by the appellant are necessarily superseded by the limitations contained in Section 6334 of the Internal Revenue Code of 1954, which applies to Guam as part of the separate income tax law enacted by Section 31 of the Organic Act. Section 6334 reads as follows:

"Sec. 6334. Property Exempt From Levy.

(a) Enumeration.—There shall be exempt from levy—

(1) Wearing Apparel and School Books.—Such items of wearing apparel and such school books as are necessary for taxpayer or for members of his family;

(2) Fuel, Provisions, Furniture, and Personal Effects.—If the taxpayer is the head of a family, so much of the fuel, provisions, furniture, and personal effects in his household, and of the arms for personal use, livestock, and poultry of the taxpayer, as does not exceed \$500 in value;

(3) Books and Tools of a Trade, Business, or Profession.—So many of the books and tools necessary for the trade, business, or profession of the taxpayer as do not exceed in the aggregate \$250 in value.

(b) Appraisal.—The officer seizing property of the type described in subsection (a) shall appraise and set aside to the owner the amount of such property declared to be exempt. If the taxpayer objects at the time of the seizure to the valuation fixed by the officer making the seizure, the Secretary or his delegate shall summon three disinterested individuals who shall make the valuation.

(c) No Other Property Exempt. — Notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a).''

It is submitted that the express provisions of Section 6334(c) bar any exemptions as far as payment of the income tax is concerned other than those set forth in Section 6334(a).

Not only does this section supersede any exemption claimed under Section 454(a) of Title 38 U.S.C., but it also supersedes any exemption claimed under any law enacted by the Legislature of Guam. By the enact-

ment of Section 31 of the Organic Act, establishing a separate territorial income tax for Guam, the United States Congress by including therein the exemption provisions of the Internal Revenue Code as a part of the income tax law of Guam necessarily provided the exemption provisions which must be followed. Any contrary exemption under a locally enacted law of Guam, then in effect or thereafter enacted by the Guam Legislature, would have no application.

It is submitted that Appellant Phelan's separate cause of action did not state a claim upon which relief could be granted.

VIII.

THERE WAS NO ERROR IN PERMITTING MEMBERS OF THE ATTORNEY GENERAL'S STAFF TO REPRESENT APPELLEES IN THE DISTRICT COURT.

In Part VI of their brief (Appellants' Brief, 52-53) appellants ask a reversal on the ground that the District Court permitted "laymen," namely, "two employees of the Attorney General of Guam," to appear and represent the appellees.

The persons referred to are, respectively, the Deputy Attorney General and Deputy Island Attorney. (R. 24.)

The appellees have been sued as individuals, but for acts done in their official capacities and under color of

office, as respectively, the Director of Finance and his subordinate, the Commissioner of Revenue and Taxation.

Under Sections 5101, 7000 and 7001, Government Code of Guam, the Department of Law, under the direction of the Attorney General "shall have cognizance of all legal matters in which the government of Guam is in anywise interested."

In addition Section 7101, Government Code of Guam, provides that the Island Attorney, or his deputy shall " . . . conduct on behalf of the Government of Guam all civil actions in which the government is a party or interested."

Section 7, Government Code of Guam, authorizes a deputy of any public officer to perform any duty imposed upon such public officer.

Surely the Government of Guam is interested in this pending litigation involving such an important question as the legality of the territorial income tax. Consequently, in appearing as counsel for the appellees, members of the Attorney General's staff are not engaged in private practice but are defending the interests of the Government of Guam.

It is a matter of common knowledge that litigation against individual United States collectors or directors of internal revenue are defended by United States government counsel.

CONCLUSION.

It is submitted that the District Court of Guam properly denied appellants' motion for temporary injunction and thereafter properly granted appellees' motion to dismiss the complaint for lack of jurisdiction. Consequently, appellants' combined appeal is without merit and the decision of the District Court should be affirmed.

Dated, Agana, Guam,
July 18, 1955.

Respectfully submitted,

HOWARD D. PORTER,

Attorney General of Guam,

LOUIS A. OTTO, JR.,

Deputy Attorney General of Guam,

LEON D. FLORES,

Island Attorney of Guam,

RICHARD ROSENBERRY,

Deputy Island Attorney of Guam,

Attorneys for Appellees.

(Appendix Follows.)

Appendix.

Appendix

Government of
The Virgin Islands of the United States

Charlotte Amalie, St. Thomas

November 16, 1954

Honorable William C. Strand
Director, Office of Territories
Department of the Interior
Washington 25, D. C.

My dear Director Strand:

This is in response to your letter of November 9, 1954, requesting certain information regarding the enforcement of the Income Tax Laws in the Virgin Islands.

In enforcing the Income Tax Laws in the Virgin Islands, we have never had to apply the criminal provisions of the Internal Revenue Code. If such action becomes necessary, our proceedings will be based on the Federal law, since we do not have any territorial laws implementing the Federal laws.

Sincerely,

A. A. Alexander
Governor

United States Department of Justice

United States Attorney
Virgin Islands of the United States
Charlotte Amalie, V. I.

June 3, 1954

Honorable Louis A. Otto, Jr.
Acting Attorney General
Government of Guam
Agana, Guam

My dear Mr. Otto:

This is in reply to your letter of May 24, 1954, requesting information covering the collection of income tax in this jurisdiction under Section 1397, Title 48 U.S.C.A.

Ever since the income tax laws of the United States became applicable to the Virginia Islands they have been enforced under the provisions of the United States Internal Revenue Code. The Commissioner of Finance was designated the Collector of Internal Revenue by the Governor of the Virgin Island and an office set up administratively to administer and collect the tax. No local legislation has been passed to implement in any way the procedure in the collection of the tax, criminal or civil. The only thing which is done locally is to set up in the annual budget a certain amount for the purpose of refunding overpayment of taxes.

It is my opinion that it would be advisable for you to operate solely under the income tax laws of the United States than to supplement them by any local law. I do not think any such law will improve on the Federal law and whatever is necessary to be done with respect to the establishment of an office to collect and administer the tax may be done administratively.

Hoping this information will be of service to you and with kindest regards, I am

Sincerely yours,

/s/ Cyril Michael

Cyril Michael

United States Attorney

No. 14,585

IN THE

United States Court of Appeals
For the Ninth Circuit

FINTON J. PHELAN, JR., and E. R. CRAIN,
Appellants,

VS.

RICHARD TATTANO and HARRY L. MANGERICH,
Appellees.

On Appeal from the District Court of Guam for the
Unincorporated Territory of Guam.

APPELLANTS' REPLY BRIEF.

FINTON J. PHELAN, JR.,

Suite 201-203, Mesa Building,

First Street West, Agana, Guam,

E. R. CRAIN,

Suite 101, Aflague Building, Agana, Guam,

Pro Se.

FILE

AUG 30 1955

PAUL P. O'BRIEN, CLERK

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No. 14,585

IN THE
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For the Ninth Circuit

FINTON J. PHELAN, JR., and E. R. CRAIN,
Appellants,

vs.

RICHARD TAITANO and HARRY L. MANGERICH,
Appellees.

On Appeal from the District Court of Guam for the
Unincorporated Territory of Guam.

APPELLANTS' REPLY BRIEF.

JURISDICTIONAL STATEMENT.

Jurisdiction is amply set forth in the opening and answer briefs, despite an inaccurate statement in appellees' brief concerning the jurisdiction of the District Court of Guam.

STATEMENT OF THE CASE.

Appellants abide by their statement of the case contained in the opening brief. Appellees improperly attempt to argue in their statement of the case and to introduce irrelevant matter. The obvious conclu-

sion to be drawn is that appellees seek in their statement to mislead the Court.

ISSUES HEREIN PRESENTED.

Appellees have obviously failed to discuss certain of the points raised by appellants. Appellants believe that no new issues have been raised by the answer brief though appellees have attempted to re-cast the issues. As well as we can interpret their rather disorganized brief, we feel that they have narrowed the points for consideration and in effect conceded major points to appellants.

SUMMARY OF ARGUMENT.

Appellants contend that the *Laguana* case does not apply to or govern this case; that even if correctly interpreted by appellees it is neither as broad as they contend, nor has it decided many of the questions herein in issue. These points were not raised in the *Laguana* case, and even if considered, being unnecessary to the decision of that case, they are not decisive of the issues raised here.

Substantially, the appellees insist that the *Laguana* case had decided all possible issues; that there cannot be any question as to appellees' status or authority; that actually no constitutional issues are raised; that the unknown text of an unpublished statute is clear, definite, certain and presents no ambiguities.

Appellees persist in their fundamental misconception that we have attacked the constitutionality of the Organic Act of Guam rather than facing the fact that we are attacking their interpretation of the statute, which interpretation contains the constitutional vices we complain of. There is a difference. If, and we do not so concede, their interpretation were the only possible one, then the invalidity of the statute might be in question. However, we contend, whether appellees wish to admit the fact or not, that their interpretation must fall due to the constitutional weaknesses therein contained, and that properly construed, the statute is valid and, deleting the defects attempted to be engrafted thereon by appellees, it is both clear and practicable.

Appellees have discussed at length the equity aspects raised by appellants. This discussion serves only to emphasize their confusion as to the issues which must be resolved. Actually, this portion of their brief is of little help. Argument must be upon the same set of issues. Here, appellees are discussing questions of their own making, and they evade the issues presented by appellants. Appellees demonstrate the constitutional infirmities of their position by their frequent reliance upon disconnected sections of Title 26 USCA, without explaining why the remainder is not applicable in Guam.

Lastly, appellees are forbidden by local statutes to represent private individuals, and if the Government of Guam is an interested party to this action, it should have entered an appearance.

ARGUMENT.

APPELLANTS' REPLY TO APPELLEES' POINT I.

Appellees misconstrue the *Laguana* case and fail to confine it to its proper sphere. Insofar as that case goes, the decision can still be entirely correct and yet not govern a single point raised in this case. Appellants contend that though the *Laguana* case was correct upon its factual situation, it is not in point here, and it is not the ruling case as is asserted by appellees.

The *Laguana* case did not raise many of the issues herein raised, and as to those issues, it cannot govern, even if discussed in its dicta. A standard canon of construction is that only the points necessary to the decision are settled. All others, though discussed, are dicta. *Laguana* was held to have failed to state a claim upon which relief could be granted. Having conceded that a tax was owed to someone, and that Ansell was the duly constituted officer to receive taxes for the Government of Guam, the Court had little choice except to find as it did. The numerous points raised in this action were neither raised in that case nor considered. Therefore, as to substantially all of the issues herein, *Laguana's* case is not ruling.

Further, basic facts stipulated to in the *Laguana* case are here in controversy. Can *Laguana's* stipulation preclude others not privy to him? We believe not. A main point blithely assumed by our adversaries is that it has been conclusively determined that they are the proper collectors, yet this is a fact in issue. Actually, a major question is, are there any proper officers of Guam duly authorized to collect such a tax?

Conceding for argument's sake that the *Laguana* case is sound, it cannot solve the various constitutional questions raised by appellants as set forth in appellants' Points No. II, IV, VII (b), (c), (d), and (e). Appellees, basing their entire position on one case, twist it by tortuous reasoning to constitute an entire system of jurisprudence. This they cannot do.

Appellants assert that substantially all of appellees' argument under Point I of their brief consists of extraneous matter used to confuse the issues so that the fundamental questions raised are obscured and may pass unnoticed.

We contend that the *Laguana* case must be confined to its own set of facts, does not govern the instant case and is not in point.

APPELLANTS' REPLY TO APPELLEES' POINT II.

Again, appellees rely wholly upon the *Laguana* case. Appellees deliberately misconstrue the contentions of appellants. We contend that appellees have no authority and that the District Court of Guam was in error in holding that appellees do have such authority. It is a fact not properly the subject of judicial knowledge, and no competent evidence was before the Court.

The untenable position of appellees is amply demonstrated by the introduction of legislation requested by the Governor of Guam in the Third Guam Legislature for the purpose of creating authority for appellees to collect the alleged tax; to create the office of Commis-

sioner of Revenue and Taxation; and to create a territorial income tax—all being urgency measures. (See letter of the Executive Secretary of the Guam Legislature with enclosures, Appendix.) It is a fact of major interest that the Guam Legislature failed to enact these measures. We contend that at least error is clearly confessed by implication.

We may dismiss without comment appellees' argument as to what might have, or could be, done. Taxation must stand upon actual facts, not possibilities. The discussion of whether Section 31 is a local statute or otherwise serves no purpose. The Congress is perfectly capable of speaking clearly, and since that section is part of a law of the United States, and since Congress did not differentiate it, we know of no rule of construction which will enable anyone to lift a section out of context and thus create a different type of statute. Laws are not amended with a scissors.

Rather, should not the text stand on its own plain words. We contend that it is clear, workable and does not support the erroneous position of appellees.

APPELLANTS' REPLY TO APPELLEES' POINT III.

A. *Laguana*, like unto the Phoenix, rises again. Standing upon that durable case, appellees assert that, it being correct, we cannot raise any constitutional question; all are decided; and they do not exist. Even if Section 31 does create, or attempt to create, as interpreted by appellees, a separate territorial tax, the

constitutional points do exist and not having been decided, are not concluded or precluded by *Laguana*.

B. Appellees deliberately attempt to confuse our position on the delegation of legislative power. Also, by discussing what Congress might do, but did not do, they attempt to obscure and becloud the issue, not meet it.

We still assert that the Commissioner of Internal Revenue is authorized by law to construe and interpret only statutes that he has the duty to enforce. So, in I.T. 4046 it is clear that if he had authority to construe the Organic Act of Guam, he has also the duty to enforce the tax therein determined by him to exist; that to so construe it as to delegate enforcement duties and authorities to unauthorized persons is the abandonment of his statutory duties. And if the Commissioner of Internal Revenue has not the duty to enforce the law, he likewise lacks the authority to construe it.

We state that the Commissioner has attempted, by construction, to delegate his duties to the Government of Guam and, by the same administrative construction, to read into a statute a delegation of the legislative function: that is, the power to amend. We further state that the Governor of Guam and these appellees have usurped such powers, basing their alleged authority upon the unauthorized interpretation of the Commissioner of Internal Revenue.

C. Appellees profess to be unable to find our indefiniteness, uncertainty, vagueness, or ambiguity in Section 31 of the Organic Act, as interpreted by themselves.

Is not the test of a statute wherein words have been substituted, deleted, added, certain sections amended, some dropped, others unpublished or unknown; and still others, despite changes, still not available to anyone, lacking in the very attributes claimed by appellees to exist? If, as appellees contend, their altered statute is clear, plain and unambiguous, why do they refuse to make known its text? Not even by requests for admissions in the case of *Wilson et al. v. Kennedy et al.*, now on appeal, could that information be obtained. Though appellees concede they have made changes, they refuse to make available the text, or to see the very vices they concede to exist. We conclude therefore that appellees have conceded our position but still refuse to admit such.

D. This sub-point is replied to simply. We do not challenge the constitutionality of Section 31, merely the interpretation placed upon it by appellees.

APPELLANTS' REPLY TO APPELLEES' POINT IV.

An intelligent reply is difficult to make due to the fact that appellees shift their asserted position as suits their convenience; at one time discussing a Federal tax, another a territorial tax, then a Federal law of local application, and, of course, portions of the Guam Code. However, a few misconceptions stand out.

A. Section 7421 (a) T 26 USC refers to United States taxes—no others. How far can legislation by implication be carried? Surely, not as far as appellees contend. Appellees fail to substantiate their position.

B. Appellees entertain us with a discourse on equity, and attempt to sustain the proposition that we are not entitled to equitable relief and that the District Court did not err. The record speaks for itself. Appellees fail to see that under the facts alleged, and not refuted, extraordinary circumstances exist; namely, *total ruin*. Is this mere hardship? Are not unwarranted fraud penalties demonstrative of capriciousness and arbitrary action?

C. This sub-point is covered briefly. Appellees assert that adequate remedies exist, yet admit that they do not know what they are. Wherein is the adequacy? What procedures exist, where can they be found, and by whom are they provided?

D. Appellees herein hardly should be dignified with a reply; however, appellants replying on their opening brief, nevertheless assert that as to this specification appellees are in error. One comment, however, should be made concerning the allegation of innuendo to be found on page 60 of the answer brief. The record is clear, TR 25, and if any other inference can be drawn from the facts, it is acceptable. The record tells the story.

APPELLANTS' REPLY TO APPELLEES' POINT V.

Section 7422 (a) of the Internal Revenue Code of the United States applies only to taxes collected by the United States. Appellees assert that our rights are barred because no claim for a refund was filed pursuant to that section. They construe their illegal

acts to be the collecting of a tax. We assert these acts are not tax collections. We ask to whom does one go to seek a refund when the very men who committed the tort assert the right to pass upon the legality of their own acts. We are in Court trying to determine the existence of any procedures, what they are, and who is entitled to administer them. We contend that an adequate remedy must be such a remedy as may be enforced in a Federal Court. Could any United States District Court determine the adequacy of the asserted remedies? Or even adjudicate any question arising under this unpublished statute? Yet, we are in court under the Constitution and laws of the United States.

APPELLANTS' REPLY TO APPELLEES' POINT VI.

Appellees insist that though an appeal lies from the denial of a temporary injunction, yet nothing prevents the trial Court from immediately after an appeal is taken, dismissing the complaint and rendering the appeal vain.

Appellees cite *ex parte National Enameling and Stamping Company* (1906), 201 U.S. 156, 26 S.Ct. 404, 50 L. ed. 707, in support of their position. This case decided prior to the XVI amendment, is one involving patent law.

To appellants, it appears that this matter being equitable in nature, that case must be applied in an equitable manner, due consideration being given to the facts of the instant case. Further, the rule cited

appears to have certain exceptions in instances where either the entire record must necessarily be considered by the appellate Court upon an appeal from a denial of a preliminary injunction or when to take further action in the case, before the determination of the appeal, would have the effect of rendering the appeal meaningless.

The following cases support this contention:

Goldwyn Pictures et al. v. Howells Sales Co., 287 F. 100:

“... On such appeals our power to review cannot be ‘hampered or restricted by any prior ruling of the trial court, * * * though made in an order from which a direct appeal is not allowed, especially where such ruling relates to the jurisdiction of the court.’ *Lake Street, etc., Co. v. Farmers’, etc., Co.*, 77 Fed. 769, 23 C.C.A. 448. Such appeal brings up the whole case as it is, and we may ‘consider and determine the case on its merits, and thereupon render or direct a final decree dismissing the bill.’ *Smith v. Vulcan Iron Works*, 165 U.S. 518, 17 Sup. Ct. 407, 41 L.Ed. 810.”

Commercial National Bank in Shreveport v. Parsons, 144 F.2d 231, 240:

“... An appeal in equity, unless expressly restricted, brings up both law and fact. It is a proceeding in continuation of the original suit. The entire cause is removed to the appellate court and tried de novo on the record and evidence in the lower court. Findings of fact may not be set aside unless clearly erroneous, and due regard must be given to the opportunity of the trial court to

judge of the credibility of the witnesses; but there is nothing in our decision that contravenes the provisions of this rule, or of any rule, statute, or legal principle that has been called to our attention.”

Smith v. Vulcan Iron Works, 165 U.S. 518, 41 L. ed. 810:

“ . . . The manifest intent of this provision, read in the light of the previous practice in the courts of the United States, contrasted with the practice in courts of equity of the highest authority elsewhere, appears to this court to have been, not only to permit the defendant to obtain immediate relief from an injunction, the continuance of which throughout the progress of the cause might seriously affect his interests, but also to save both parties from the expense of further litigation, should the appellate court be of opinion that the plaintiff was not entitled to an injunction because his bill had no equity to support it.”

It is our belief that the entire case of necessity was transferred to the Court of Appeals. In any event, under the facts in this case and considering the element of time, is not the hurried dismissal by the District Court an abuse of its discretion in effect determining the matter prior to the action of the appellate Court—this action is largely equitable, we think, that the flexibility of equity and its broad principles should govern, but did not.

APPELLANTS' REPLY TO APPELLEES' POINT VII.

Appellants stand upon the argument presented in the opening brief. We wish to point out, however, that pensions to veterans under Title 38 USCA are now denominated compensation.

APPELLANTS' REPLY TO APPELLEES' POINT VIII.

In our opening brief we alleged error on the part of the District Court in permitting persons not members of the bar of the District Court to appear on behalf of defendants. In appellees' reply brief, no denial is made of that assertion. These individuals assert their right to appear on behalf of the Government of Guam although they never assert that they are members of the bar of the Court. Neither has the Government of Guam shown sufficient interest in this and similar litigation to interplead; yet these persons insist they appear to protect its interests. Is it not strange that though there are members on the staff of the Attorney General of the Government of Guam who are members of the bar of the District Court, none of them has appeared in any hearing of the tax litigation presently pending?

CONCLUSION.

Appellants, therefore, claim that appellees having conceded major portions of our contention, that error has been demonstrated, the District Court of Guam

should be reversed, an injunction issue, and the appellees required to answer the complaint on its merits.

Dated, Agana, unincorporated territory of Guam,
August 17, 1955.

Respectfully submitted,
FINTON J. PHELAN, JR.,
E. R. CRAIN,
Pro Se.

(Appendix Follows.)

Appendix.

Appendix

Third Guam Legislature

Territory of Guam

(Seal)

F. B. Leon Guerrero, Speaker

B. J. Bordallo, Vice-Speaker

A. S. N. Duenas, Legislative Secretary

Rev. R. C. Flores, Chaplain

John A. Bohn, Counsel

April 13, 1955

Mr. E. R. Crain

Attorney-at-Law

Agana, Guam

Dear Mr. Crain:

Copies of Bills No. 28, 46, 57, and 78, Third Guam Legislature, are herewith forwarded in compliance with your letter of April 7th. All four bills were submitted to the Legislature by the Governor.

Very truly yours,

/s/ Maria C. Duenas,

Maria C. Duenas,

Executive Secretary.

Enclosures (4)

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Third Guam Legislature
1955 (First) Regular Session

Bill No. 28 Introduced by.....
 Committee on Finance &
 Taxation, by request

An Act to add Chapter 10, Title XX, to the Government Code of Guam, for the purpose of enabling other states, territories, and possessions of the United States, and their political subdivisions, to maintain suits in the District Court of Guam to recover taxes on a reciprocal basis, and for other purposes.

Be It Enacted by the People of the Territory of Guam:

Section 1. There is hereby added to Title XX, of the Government Code of Guam a new Chapter 10 to read as follows:

* * * * * *

Section 2. This Act is urgency measure and shall take effect upon its approval by the Governor.

* * * * * *

Third Guam Legislature
1955 (First) Regular Session

Bill No. 46 Introduced by.....
 Committee on Finance and
 Taxation, by request.

An Act to clarify and add various enforcement provisions to the Business Privilege Tax Law, Chapter 6, Title XX, of the Government Code, by adding Sections 19527 and 19528, by repealing Subsection 19501.0206 of Section 19501 and adding Section 19529,

by repealing Subsection 19501.0213 of Section 19501 and adding Section 19530, by amending Subsection 19566.01 of Section 19566, by adding Subsection 19593.03 to Section 19593, by repealing present Subsection 19501.05 of Section 19501 and adding a new Subsection 19501.05 to Section 19501, by repealing present Section 19503 and adding a new Section 19503, by amending Sections 19504, 19506, 19510, and 19511, by amending Subsection 19513.04 of Section 19513, by adding Subsection 19513.08 to Section 19513, by amending Subsection 19541.0104 of Section 19541, by amending Section 19542, by amending Subsections 19543.08 and 19543.1010 of Section 19543, and to add Chapter 1 to Title XX of the Government Code, relative to the functions of the Director of Finance and the Commissioner of Revenue and Taxation, and for other purposes.

Be It Enacted by the People of the Territory of Guam:

Section 1. Section 19527 is hereby added to Chapter 6, Title XX, Government Code, as follows:

* * * * *

Section 19. Chapter 1 is hereby added to Title XX, Government Code to read as follows:

“Taxation

Chapter 1—General

Section 19000. Director of Finance. The administration and enforcement of this Title and the collection of all taxes provided by law shall be performed by or under the supervision of the Director of Finance, hereinafter referred to as the Director.

Section 19001. Commissioner of Taxation. There shall be in the Department of Finance a Commissioner of Revenue and Taxation who shall have such duties and powers as may be provided by law or prescribed by the Director.

* * * * *

Section 20. This is an urgency measure and shall take effect upon its approval by the Governor.

* * * * *

Third Guam Legislature
1955 (First) Regular Session

Bill No. 57

Introduced by.....

Committee on Finance and
Taxation, by request

An Act to add Chapter 7 to Title XX of the Government Code of Guam, concerning the Guam Territorial Income Tax.

Be It Enacted by the People of the Territory of Guam:

Section 1. The following Chapter 7 is hereby added to Title XX of the Government Code of Guam as follows:

“Chapter 7

Guam Territorial Income Tax

Section 19600. Designation. The territorial income tax provided by Section 31 of the Organic Act of Guam (Public Law 630, Chapter 512, 81st Congress) is hereby designated the Guam Territorial Income Tax.

Section 19600.1. Authority of Department of Finance.

(a) Except as otherwise expressly provided by law, the administration and enforcement of the Guam Territorial Income Tax shall be performed by or under the supervision of the Director of Finance, herein referred to as the Director.

* * * * *

(a) The term "Secretary" or "Secretary of the Treasury" shall mean the Director of Finance of the government of Guam.

(b) The term "Secretary or his delegate" shall mean the Director of Finance of the government of Guam . . .

* * * * *

Section 19600.4. Rules and Regulations. The Director, or his delegate, shall have authority to prescribe all needful rules and regulations necessary to adapt and apply as the Guam Territorial Income Tax the income tax laws of the United States. . . .

* * * * *

Section 19600.5. Compromises. The Director or his delegate may compromise any civil or criminal case arising under the Guam Territorial Income. . . .

* * * * *

(f) Tax Court. The District Court of Guam shall have the same jurisdiction with respect to the Guam Territorial Income Tax as the United States Tax Court has with respect to the United States Income

tax under the United States Internal Revenue Code of 1939, as amended. . . .

* * * * *

. . . The District Court of Guam shall implement this Section as may be necessary by rules of procedure.

* * * * *

Section 2. This Act is an urgency measure and shall take effect upon the approval of the Governor.

* * * * *

Third Guam Legislature
1955 (First) Regular Session

Bill No. 78

Introduced by.....

Committee on Finance and
Taxation, by request

An Act to add Chapter 8 to Title XX, Government Code of Guam, to require the filing of copies of United States income tax returns under certain conditions, and for other purposes.

* * * * *

Section 2. This Act is an urgency measure and shall take effect upon its approval by the Governor.

* * * * *

No. 14,585

IN THE

United States Court of Appeals
For the Ninth Circuit

FINTON J. PHELAN, JR., and E. R. CRAIN,
Plaintiffs-Appellants,

VS.

RICHARD TAITANO and HARRY L. MANGE-
RICH,
Defendants-Appellees.

Appeal from the Judgment of the District Court of Guam.
Civil Case No. 69-54.

SUPPLEMENTAL BRIEF OF APPELLEES.

HOWARD D. PORTER,

Attorney General of Guam,

LOUIS A. OTTO, JR.,

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SUPPLEMENTAL BRIEF OF APPELLEES.

The attention of the court is invited to Public Law 321 of the 84th Congress, approved August 9, 1955, a date subsequent to the filing of appellees' brief, which amends Section 3401 of the United States Internal Revenue Code of 1954, 26 U.S.C. 3401, to read:

“Sec. 3401. Definitions.

(a) Wages. For purposes of this chapter, the term ‘wages’ means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in

any medium other than cash; except that such term shall not include remuneration paid—

* * * * *

(8) (A) for services for an employer (other than the United States or any agency thereof)—

(i) Performed by a citizen of the United States, if, at the time of the payment of such remuneration, it is reasonable to believe that such remuneration will be excluded from gross income under section 911; or

(ii) performed in a foreign country *or in a possession of the United States* by such a citizen if, at the time of the payment of such remuneration, the employer is required by the law of any foreign country *or possession of the United States* to withhold income tax upon such remuneration; * * *” (Amendment to prior law indicated by italics.)

This amendment, by adding the reference to “possession of the United States,” exempts from the United States withholding tax any income which is subject to withholding by a possession of the United States.

“Possession” includes, of course, the unincorporated territory of Guam. Section 25, Organic Act of Guam; 48 U.S.C., Section 1421c(b).

The legislative history of Public Law 321 shows that Senate Report No. 1244, July 29, 1955, of the Senate Committee on Finance accepted House Report No. 1354, July 23, 1955, of the House Committee on Ways and Means. This states, in part:

“REASONS FOR BILL

Under present law the wages of a United States citizen employed in Puerto Rico or a possession of the United States may under certain circumstances be reduced by withholding for the income tax of Puerto Rico or the possession as well as for the Federal income tax. This is true even though eventually the foreign tax credit in these cases usually relieves the taxpayer of most or all of the Federal income tax liability. This has presented especially serious problems in the case of Puerto Rico although the problem also exists to a lesser extent in the case of the Virgin Islands *and Guam*. As a result of this double withholding, potential employees are reluctant to take jobs in Puerto Rico or the possessions. Moreover, the Internal Revenue Code already relieves United States citizens who perform services in a foreign country (for an employer other than the United States) from the withholding of the Federal income tax where withholding of a foreign income tax is provided.” (*Italics added.*)

1955 U. S. Code Congressional and Administrative News, No. 14, August 20, 1955, page 4294.

This direct and recent action by the Congress of the United States indicates approval of the decision in *Laguana v. Ansell* (DC Guam, 1952), 102 F. Supp. 919, affirmed (CA 9, 1954), 212 F. 2d 207, certiorari denied, 348 U.S. 830, 75 S. Ct. 51, 99 L. Ed. 32, cited and quoted in appellees' brief, construing Section 31 of the Organic Act as creating a separate territorial

income tax, including withholding provisions. The plaintiff, Laguana, sued for a refund of the amount of the tax withheld from his wages.

Such subsequent congressional action is certainly indicative that this Court in affirming the decision of the District Court of Guam in the *Laguana* case correctly interpreted the legislative intent with regard to Section 31 of the Organic Act. It directly refutes the contrary construction argued by appellants in their opening brief, at pages 48-51, and 59.

In 50 Am. Jur. "Statutes" Section 337, at page 328, it is stated:

"Subsequent Legislative Action.—The interpretation of a statute by the legislative department of the government may go far to remove doubt as to its meaning. This fact is recognized by the courts which regard it as proper, in determining the meaning of a statute, to take into consideration subsequent action of the legislature, or the interpretation which the legislature subsequently places upon the statute. There are no principles of construction which prevent the utilization by the courts of subsequent enactments or amendments as an aid in arriving at the correct meaning of a prior statute, and it is very common for a court, in construing a statute, to refer to subsequent legislation as impliedly confirming the view which the court has decided to adopt. Indeed, it has been held that if it can be gathered from a subsequent statute in *pari materia* what meaning the legislature attached to the words of a former

statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute.”

Dated, Agana, Guam,
November 10, 1955.

Respectfully submitted,

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Deputy Attorney General of Guam,

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RICHARD ROSENBERRY,

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Attorneys for Appellees.

No. 14,586

United States Court of Appeals
For the Ninth Circuit

NG YIP YEE,

Appellant,

VS.

BRUCE G. BARBER, District Director, Im-
migration and Naturalization Service,

Appellee.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

APPELLANT'S OPENING BRIEF.

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**United States Court of Appeals
For the Ninth Circuit**

NG YIP YEE,

Appellant,

VS.

BRUCE G. BARBER, District Director, Im-
migration and Naturalization Service,

Appellee.

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

APPELLANT'S OPENING BRIEF.

This is an appeal from an order entered in the District Court of the United States for the Northern District of California, Southern Division, on 29 September 1954, dismissing the appellant's Petition for a Writ of Habeas Corpus.

JURISDICTION.

Jurisdiction of this Court to review the order of the trial Court is provided for by Section 2253 of Title 28 U.S.C.A.

STATEMENT OF FACTS.

The appellant, Ng Yip Yee, was born 7 April 1931 in China, the natural and legal son of Ng Ah Saw, a citizen of the United States born in Seattle, Washington, 6 September 1886.

The appellant made his application before the United States Consul in Canton, China, in the year 1949, for recognition of his United States citizenship, and after investigation by the United States Consul and the Secretary of State, the Passport Division of the State Department, Washington, D. C., recognized his claim to United States citizenship, and the American Consul at Hong Kong, B. C. C., was directed to issue him, and did issue, a valid passport on or about 1 July 1953.

The appellant arrived at the Port of San Francisco on 27 August 1953, and thereafter was detained by the order of the appellee, the District Director of the Immigration and Naturalization Service, an agent of the Attorney General, without the right of bond. During the period of detention, the passport of the appellant was summarily revoked, without hearing, and the appellant was reduced to the status of an alien seeking entry to the United States.

A Writ of Habeas Corpus was filed on 15 September 1953, and from the order of dismissal an appeal was taken to the Court of Appeals for the Ninth Circuit, which dismissed the appellant's cause on 24 December 1953 for lack of jurisdiction. (*Ng Yip Yee v. Bruce Barber*, 113 Fed. 2d 116.)

The appellant was ordered excluded, from which decision an appeal to the Board of Immigration Appeals was dismissed, and after being confined for more than a year in detention appellant was released on parole. On 27 August 1954 a Writ of Habeas Corpus was filed in the District Court, from the dismissal of which this appeal results.

The evidence showed that three sons and a daughter of Ng Ah Saw, the brothers and sister of appellant, as well as the father testified on his behalf, and the record shows that all the favorable testimony given by the father and brothers and sister was ignored by the hearing officer, arbitrarily and upon mere caprice, as were numerous family photographs, which were admittedly strong evidence of family relationship, as well as documents of birth, school records, bank drafts, and family letters, which were put into evidence during the administrative hearing and are contained in the record.

Again, the record shows that the appellee arbitrarily entered into evidence only a portion of the hearing of Ng Yip Yee before the Secretary of State, which was part of the application for a passport, and excluded a portion of said hearing, and further that documentary evidence offered by the appellant and admitted in evidence was carelessly misplaced by the Government and lost forever to the use of appellant.

Further, the record shows that the appellee arbitrarily discredited the expert testimony of a witness who was a former employee of the appellee in that

capacity of expert, and that the appellee discredited its own witnesses when the testimony adduced during the hearing proved favorable to the appellant.

The hearing officer invoked conjecture, supposition and imagination and deduced that the appellant was the son of someone other than Ng Ah Saw, the father of appellant, and further, the appellant was charged with fraud and imposition by the appellee, although the record fails to show any evidence of fraud. The appellee failed to produce any testimony showing that the appellant was an imposter, and did not base his findings upon evidence produced at the inquiry as required by Section 236, Immigration and Nationality Act, 8 U.S.C. 1226.

SPECIFICATION OF ERROR.

Specifications of errors are set forth at page 27 of the Transcript of Record.

ARGUMENT.

The Court did not hear the matter with respect to the objections of appellant regarding the administrative hearing. The record, consisting of numerous pages of single-spaced typing, exhibits, files and documents covering two hearings and two appeals, was put in evidence.

As to the first specification of error, we must conclude that if any unfairness appears on the face of

the record of the administrative hearing, then the Court was in error in holding that a "full and fair hearing was granted."

At the outset of the proceedings, appellant's United States passport was taken up and cancelled without a hearing. The fact that appellant was in possession of a valid passport, issued to him as a citizen of the United States by the Secretary of State, was ignored completely by the Attorney General, and appellant was arbitrarily thereupon reduced from the status of at least a *prima facie* citizen to that of an alien.

This was contrary to the rule of law as set forth in *U. S. v. Browder*, 113 F. 2d 97:

"A passport certifies that the person therein described is a citizen of the United States and requests for him while abroad for permission to come and go as well as lawful aid and protection, and is a document which from its nature and object is addressed to foreign powers."

Another pertinent fact that the trial Court overlooked was that the Secretary of State having already decided the question of citizenship of appellant, then he was a citizen of the United States, and the mere revocation and defacing of the passport did not in itself reduce him to the status of an alien.

This point was decided in *Gillars v. United States*, 182 F. 2d 962:

"In any event the revocation of a passport, nothing more appearing, does not cause a loss of citizenship, or dissolve the obligation issuing from citizenship."

It cannot be stressed too greatly that at the outset of the hearing and proceedings appellant was not given a full and fair hearing, with respect to all his rights, wherein he was denied due process in that he was not permitted to defend his right to possess his passport and that he was not given notice of the reason his passport was summarily and perfunctorily revoked. This act of the appellee was an absolute denial of due process of law as guaranteed by the Constitution.

This question of the revocation of a passport without a hearing was decided by three justices en banc, *Bauer v. Acheson*, 106 Fed. Supp. 445, wherein it was held that the Secretary of State was without authority to summarily revoke a passport, without prior notice or opportunity for hearing.

In the second point of error, the Court found that appellant was a mere claimant to citizenship, or an alien seeking admission, with the burden of proof. To the contrary, the appellant was a citizen of the United States in possession of a valid passport at the time of his entry.

In *Gee May v. McGrath*, 111 F. 2d 327, the Court held:

“A determination of status of a Chinese as a son of an American citizen creates a prima facie case in behalf of such Chinese in subsequent habeas corpus proceedings for release from custody under exclusion proceedings.”

The record shows that appellant was detained and interrogated for days without aid of counsel, that he

was never given notice of the reason for his detention nor the reason for the cancellation of his passport, and was thus precluded from meeting the charges and preparing his defense.

The fourth and fifth specifications of error relate to production of evidence, consisting of the State Department record covering the acknowledgment of appellant's citizenship. Appellee joined the appellant in requesting the State Department record (p. 144) but considered a subpoena duces tecum against an officer of the State Department as illegal. Thereafter the hearing officer obtained possession of said record (see pp. 227, 228) but refused to produce it, admitting only part thereof. A fair hearing would require appellee to produce all of the record then in his possession.

The withholding of this evidence by the appellee constituted an unfair and illegal hearing.

As to point six, the case of *Ng Yip Yee v. Barber*, 210 F. 2d 613, does not preclude the appellant from raising the question of his rights as a citizen and as accorded by the Secretary of State and does not permit the Attorney General wilfully to disregard and put aside appellant's citizenship and place upon him an unfair burden of proof.

Chun Kock Quon v. Proctor, 92 Fed. 2d 326, holds:

Where there has been a prior determination of citizenship by the immigration officials, it makes a prima facie case of citizenship.

See also *Wong Gum v. McGranery*, 111 Fed. Supp. 114.

The record shows that the Attorney General did not carry the burden of proving his charges of fraud, nor did he dissipate the prevailing presumption of appellant's claim to citizenship. The courts and the Board of Immigration Appeals have on many occasions held that a prior administrative determination of citizenship, while not *res judicata* in the same sense as a court judgment, nevertheless requires clear, affirmative proof of fraud in the first instance to set aside the finding of citizenship. *Choy Yuen Chan v. U. S.*, 30 F. 2d 516.

See also *Ng Fung Ho v. White*, 366 Fed. 765.

As to point seven, the Court was correct with respect to the rule of law but was in error as to the application thereof.

The Court relied on *Weedin v. Young*, 43 F. 2d 465, wherein there were findings that resulted from expert testimony with respect to the age of the applicant, and the facts produced were matters of positive evidence.

In the case of appellant, the appellee failed to produce any witnesses that gave or could give any positive, uncontradicted testimony, and the only facts as shown by the hearing record were "facts" deduced by inference, supposition and imagination of the hearing officer. Therefore, the record does not show any facts produced by the appellee, and whatever testimony was produced by the appellee, certainly cannot withstand the axiomatic "reasonable, prudent man" test. The findings of fact by the appel-

lee were based upon caprice and an arbitrary decision of the hearing officer.

At page 172 of the Special Inquiry Record of 24 March 1954, the hearing officer deduced this statement, "And information has been furnished that this applicant is not in fact the son of Ng Ah Saw but the grandson." This statement was not supported by any evidence or testimony of a single witness.

Again at page 205 of the said record, dated 31 March 1954, the special inquiry officer attempted to prove that appellant was the son of his aunt, Lum May Yee, by means of a government witness, who had already identified appellant as the son of Ng Ah Saw.

With respect to errors 8 and 9, the evidence was overwhelmingly in support of the appellant's position, and the appellee's findings were unreasonable.

Three brothers, one sister, and the father of appellant appeared in his behalf and gave positive and uncontradicted evidence in establishing the family relationship as claimed by the appellant.

The aunt of appellant, Lum May Yee, testified that she was present at the time of his birth, and a son of Lum May Yee also identified appellant. A fellow villager, Ng Kwock Fung, gave positive and uncontradicted evidence and did identify appellant as the son of Ng Ah Saw, his father. (pp. 195-210.)

An expert witness, a former employee for 24 years of the Immigration Service primarily as identification expert of Chinese persons, gave positive and

uncontradicted evidence, identifying certain photographs of appellant and his family which were contained in the records of the Immigration Service since 1938, and found such resemblance of features of appellant and his father indicating family relationship. It has been held that such resemblance proves close blood relationship, if existent. *Chooley Dee Ying v. U. S.*, 214 Fed. 273.

Documentary evidence, which included school records, drafts of remittances of support sent by the father of appellant, family correspondence, a village certificate identifying appellant, and other photographs of him taken with members of his family, were produced and admitted in evidence, yet the record will show that all of the testimony and evidence was arbitrarily ignored and capriciously rejected by the appellee.

There may have been minor discrepancies as to insignificant details, but as to the essential points with respect to establishing the paternal relationship between appellant and Ng Ah Saw, the record will show positive evidence, uncontradicted, which was in accord with the testimony given by all the brothers, sister and father. The appellant gave as his reason for discrepancies his long detention while incommunicado, the long periods of continued examination, and harassing by the interrogators. At one point of the hearing (p. 107) appellant stated his reason for discrepancies: "I was questioned every day for a period of one to two weeks." At page 112 he stated: "On the day of my arrival in San Fran-

cisco I was detained by the immigration authorities. I was scared and was not able to see any of my relatives or talk to anyone. Because I was detained by the immigration authorities right away after I arrived in San Francisco, my mind was confused, and I did not remember everything, so I said my mother died in the village.” It should be noted that the village is contiguous to the city and there was a family home in the village and the city.

With respect to discrepancies, *Gung You v. Nagle*, 84 Fed. 2d 848 holds:

Rejection of testimony of father and brothers supported by records of department, notwithstanding discrepancies, is unfair.

During the hearings over a period of more than a year, the hearing officer exhausted great efforts to produce or create discrepancies between witnesses produced by the appellant or the Government. This again constitutes an unfair hearing, as was held in *Go Lun v. Nagle*, 22 Fed. 2d 246:

The purpose of a hearing is to inquire into citizenship and not to develop discrepancies.

See also:

Nagle v. Dong Ming, 26 Fed. 2d 438.

With respect to specification of error No. 10, the appellant does not presume to ask the Court to substitute its judgment on the question of fact, but appellant contends that the Court failed to find the decision was without any factual support and was, therefore, arbitrary and a denial of a fair hearing,

which was a denial of due process. The record is devoid of any testimony or evidence of any nature that would establish that appellant was an imposter or a person other than that of the son of Ng Ah Saw, his father.

U. S. ex rel. Hom Lung Wun v. Reimer, D.C., N.Y., 1940, 31 Fed. Supp. 819:

On review of decisions of administrative officials charged with duty of enforcing immigration laws, issue before court is not how court would have decided questions, but whether decision of administrative officials was wholly arbitrary, amounting to denial of fair hearing.

The special inquiry officer, on pages 9 and 10 of his decision, dated 7 May 1954, gives as a basis for his findings as follows:

“The records of the Immigration and Naturalization Service and the State Department contain evidence of too many frauds involving claims of admissibility to the United States in every conceivable status or relationship to be ignored. In this connection a remark by one of the judges of the Ninth Circuit Court (Feb. 15, 1954) to counsel in argument before the Court concerning a so-called 503 action, is pertinent. ‘The Court can take judicial notice that notorious practices exist in the Chinese citizenship claims, and therefore there is good reason to suspect that these cases are fraudulent. It is curious that the Chinese all have sons, and I know that the majority of the cases (prior Chinese cases) were fraudulent.’ While this hearing was underway, another hearing was being

held across the hall, involving an applicant for admission of the Chinese race as a United States citizen, arriving with a United States passport, who admitted that several years before he had been fraudulently admitted to the United States as a citizen, and the hearing developed that his latest effort to violate the laws of this country proved to be a fictitious marriage with his sister and thereafter submitting a petition for a non-quota immigration visa in her behalf. Coincident with this case three Chinese aliens appeared in the United States District Court in San Francisco and pleaded guilty to violation of the immigration and nationality laws of this country involving the fraudulent entry of 16 aliens in all. In the case of one of these aliens \$4800 was involved in the single proceedings. The stage for this wholesale violation was set when an elderly Chinese brought in two families, one under the exempt status of the children of a merchant and the other family as citizens under fraudulent claims to citizenship. The record of such flagrant violations and the opportunity therefor cannot be disregarded."

The language of the hearing officer is significant with respect to his personal prejudice, which strongly shows the influence of the trial Court ruling in the cases of *Ly Shew v. Dulles*, Civ. No. 13808, and *Mar Gong v. Brownell*, 209 Fed. 2d 448, with respect to remarks of the Court concerning persons of Chinese descent claiming citizenship. Such practice of the trial Court was overruled by the Court of Appeals for the Ninth Circuit in the above quoted cases.

In *Mar Gong v. Brownell*, 209 Fed. 2d 448 the Court of Appeals held:

“We recognize all that may be said with respect to the necessity of the court guarding against imposition, but we also are of the view that no special quantum of proof should be exacted from any person claiming American citizenship merely because of his racial origin. In *Kwock Jan Fat v. White*, 253 U.S. 454, 464, the Supreme Court, reversing this court, said: ‘It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country.’ ”

The hearing officer further stated at page 9 of the decision of 7 May 1954:

“As stated in my prior opinion in this case, the matter being one of identity brings up consideration of what degree of proof is necessary in order to establish that identity. It has been ruled that an applicant either for citizenship or for admission to the United States as a citizen has the burden of convincing a proper authority by satisfactory evidence that he is entitled to citizenship, and that burden never shifts to the Government. The rule is that the proof of alleged citizenship must be clear and convincing, (*Lee Sim v. U. S.* 218 Fed. 432, 435 (2 Cir. 1918) *Ex Party Chin Him et al.* 227 Fed. 131, 133 (W.D.N.Y. 1915)). Since I find the evidence presented in support of the applicant’s cause to be neither satisfactory, nor clear, nor convincing, he has not sustained his burden of proof and his application for admission should be denied.”

This position is in contradiction to the ruling of the Court of Appeals for the Ninth Circuit in *Ly Shew v. Dulles*:

“On the contrary, once that ‘priceless’ right is established, the burden on the United States for its deprivation is that the proof shall be ‘clear, unequivocal, and convincing.’ *Baumgartner v. United States*, 332 U.S. 665, 671.”

Such conduct of the hearing officials is contrary to Section 236 of the Immigration and Nationality Act, 8 U.S.C. 1226, which requires that findings cannot be based upon evidence not related to or not produced at the hearing.

As to No. 11 of the errors set out in appellant’s brief, the Court held that appellant was placed with the burden of proof. As related *supra*, appellant was given a hearing by the Secretary of State in accordance with Section 104(a)(3) of the Immigration and Nationality Act, and was issued a valid passport after having been adjudicated a citizen. Here we have a person traveling to the United States, bearing a passport as a citizen, who is stopped at the gate of entry by the Attorney General, who on mere suspicion denies the citizenship of that person. Appellant contends that under these circumstances, having made a *prima facie* case of citizenship, it was incumbent upon the appellee to go forward with the proof.

Quon v. Proctor, 92 Fed. 2d 326, holds:

Where there has been a prior determination of citizenship by the immigration officials, it makes a *prima facie* case of citizenship.

Again in *Lee Choy v. United States*, 49 Fed. 24:

“Prior determination of citizenship is proof which must be overcome.”

We now reach the last point of error wherein the Court did not find unfairness in the hearing with respect to the charge of fraud made by the immigration authorities against the appellant.

The common law principle of fraud has not been changed by statute. The record of the hearing shows that the Attorney General charged the appellant with having procured his passport fraudulently; yet there was not a scintilla of evidence to support this charge, as evidenced by the hearing record.

Thereupon, the immigration authorities arbitrarily established the premise that appellant obtained his passport fraudulently and then placed upon him the burden of proving that he was not a fraud. This is contrary to the rule of *Ng Fung Ho v. White*, 366 F. 765:

Where Chinese were admitted as citizens on evidence that their father was a native of the United States, the burden of attack rests on the Government, et seq.

The record shows an absence of proof of fraud or of any fraudulent act committed by appellant, and the resultant conclusion of the hearing officer constitutes unfairness and illegality of the hearing.

United States ex rel. Iodici v. Wixon, 56 Fed. 2d 825, holds:

Act of Secretary of Labor in approving re-entry for alien was presumed to have been lawful until contrary was shown. Absent proof that alien's re-entry permit was obtained through fraud and failure of board to give it proper effect held arbitrary action, making proceedings culminating in exclusion unfair.

At page 9 of the special inquiry officer's decision, dated 7 May 1954, he charged:

"Without indulging in speculation, there is certainly room to suggest that he (Ng Yip Yee) is indeed the son of Ng See Kay."

Ng See Kay was an absolute stranger to the proceedings, and no evidence appeared in the hearing to substantiate this charge.

At page 172 of the special inquiry record dated 24 March 1954, another statement of the hearing officer:

"And information has been furnished that this applicant is not in fact the son of Ng Ah Saw but the grandson."

This charge is also unsupported by any evidence.

At page 205 of the hearing record, dated 31 March 1954, the Government provided a witness whom the special inquiry officer used in an attempt to prove that appellant was the son of his aunt, Lum May Yee, but failed in this charge.

CONCLUSION.

Therefore, it is contended that the appellant, a citizen of the United States, was unlawfully deprived of his passport, and that he was subjected to a hearing before the Immigration and Naturalization Service that was unfair, unlawful and illegal, and further, that the decision of the Board of Immigration Appeals and the order of deportation are arbitrary and capriciously founded and therefore illegal, and that a review of the entire hearing record will indicate that appellant was the subject of an unfair and illegal hearing.

We respectfully submit that the order and decree of the District Court should be reversed, and that writs be issued to remain in full force and effect, and that appellant be given his liberty to remain in the United States as a citizen of the United States.

Dated, San Francisco, California,

April 8, 1955.

Respectfully submitted,

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No. 14,586

IN THE

United States Court of Appeals
For the Ninth Circuit

NG YIP YEE,

Appellant,

vs.

BRUCE G. BARBER, District Director, Im-
migration and Naturalization Service,
Appellee.

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No. 14,586

IN THE

United States Court of Appeals

For the Ninth Circuit

NG YIP YEE,

Appellant,

VS.

BRUCE G. BARBER, District Director, Im-
migration and Naturalization Service,

Appellee.

APPELLEE'S BRIEF.

STATEMENT.

Appellant, Ng Yip Yee, arrived at the port of San Francisco on August 27, 1953 and sought admission to the United States as a citizen of the United States. Appellant's claim to citizenship is founded upon alleged blood relation, as a son, to Ng Ah Saw, an alleged native born citizen of the United States. An administrative hearing in accordance with Public Law 414 of the 82nd Congress, 66 Stat. 163, Title 8 U.S.C. 1101 et seq., was conducted and upon the conclusion thereof, and the appeals therefrom, the final determination was made by the Attorney General of the United States that appellant was not entitled to admission to the United States.

Appellant by habeas corpus proceedings requested the Court below to review the administrative proceedings. The appeal herein is from the order of the District Court (tr. p. 20) denying the writ of habeas corpus and dismissing the petition after review of the final determination of the Attorney General that appellant is not entitled to admission to the United States.

JURISDICTION.

Although not invoked by citation in the petition, the jurisdiction of the Court below is found in Title 8 *U.S.C.* 1503(c) (P.L. 414, §360(c)). The District Court is a Court of competent jurisdiction to review, in habeas corpus proceedings, the final determination of the Attorney General that appellant is not entitled to admission to the United States.

Title 28 *U.S.C.* §2253 is cited as authority conferring jurisdiction of this Court to review the order of the District Court upon the review of the administrative proceedings.

STATUTE.

8 *U.S.C.* 1503(c) (P.L. 414, §360(c)) 66 Stat. 163, 273.

QUESTIONS PRESENTED.

Appellant has made no attempt to present any questions involved or to state the manner in which they are raised. Simple reference has been made to the "Specification of Errors" page 27 of the transcript, which is there identified as "Statement of Points".

An analysis of the Statement of Points discloses two possible questions:

(1) That the court below erred in holding that the contention of appellant regarding the relative powers of the Secretary of State and the Attorney General in determining petitioner's citizenship have been foreclosed by *Ng Yip Yee v. Barber*, 210 F. 2d 613 (9th Cir.) cert. den. 347 U.S. 988. (Points 2, 6, 11, 12.)

(2) That the Court below erred in finding after review of the administrative record that appellant's rights were fully protected; that there were no procedural irregularities of any substance; and that he received a full and fair hearing of his claim. Points 1, 3, 4, 5, 7, 8, 9, 10.

ARGUMENT.

I.

In *Ng Yip Yee v. Barber*, 210 F. 2d 613, cert. den. 347 U.S. 988, appellant herein sought by habeas corpus proceedings to test the validity of his detention by the Immigration and Naturalization Service pending exclusion hearings which had been commenced to

determine his citizenship and right of entry. Appellant contended as he does here, that the issuance of the passport by the American Consul at Hong Kong was an adjudication or determination of his citizenship.

It is well established that a passport is merely a request to foreign governments for safe passage of the individual concerned and is not a determination of the individual's citizenship as between the United States and the individual.

Urtetiqui v. D'Arcy, 9 Pet. 692, 698;

Miller v. Sinjen (CA-8), 289 Fed. 388, 394-395;

Edsell v. Mark (CA-4), 179 Fed. 292;

Lee Pong Tai v. Acheson (E.D.Penn. 1952),
104 F. Supp. 503, 505;

Scott v. McGrath (E.D. N.Y. 1952), 104 F.
Supp. 267;

Hackworth Digest of International Law, Vol.
III, pp. 435-436.

This Court in *Ng Yip Yee v. Barber*, *supra*, held:

"The appellant obviously was a person whom the officer of the service 'suspected to be an alien' attempting to enter the United States. Appellant is not in either of the exceptions of Sec. 235(b).

"Since this administrative proceeding is being conducted by the officer specifically empowered by statute so to do, appellant has not exhausted his the officer of the service 'suspected to be an alien' administrative remedy and is not entitled to seek relief through this habeas corpus proceeding

* * *."

Appellant thereafter did exhaust the administrative proceeding as the record thereof well shows, and now seeks such review of the said proceeding as may be afforded him under 8 U.S.C. 1503(c).

Jow Chu Yun v. Barber (CA-9), #14503 and 14504 decided by this Court April 15, 1955;
Florentine v. Landon (CA-9), 206 F. 2d 870.

II.

THE COURT BELOW DID NOT ERR IN FINDING APPELLANT'S RIGHTS WERE FULLY PROTECTED, THAT THERE WERE NO PROCEDURAL IRREGULARITIES, AND THAT HE RECEIVED A FULL AND FAIR HEARING ON HIS CLAIM TO CITIZENSHIP.

The administrative proceeding involved herein is an *exclusion* proceeding as distinguished from an *expulsion* proceeding. Appellant is not within the United States.

Nishimura Ekiu v. United States, 142 U.S. 651;
United States v. Ju Toy, 198 U.S. 253;
Kaplan v. Tod, 267 U.S. 228;
Shaughnessy v. Mezei, 345 U.S. 206;
Jew Sing v. Barber (CA-9), 215 F. 2d 906;
United States v. Spar (CA-2), 149 F. 2d 881.

Section 1503(c) of Title 8 U.S.C. (P.L. 414, §360(c)) provides for a review of the administrative proceeding in habeas corpus. The entire record of the administrative proceeding is in the file. The court below did review the record and denied the

writ and dismissed the petition. Appellant seeks further review by his appeal.

Quon Quon Poy v. Johnson, 273 U.S. 352;
United States v. Sing Tuck, 194 U.S. 161;
United States v. Ju Toy, 198 U.S. 253;
Tang Tun v. Edsell, 223 U.S. 673;
Jow Chu Yun v. Barber, *supra*.

III.

APPELLANT'S ARGUMENT ON THE SPECIFICATION OF ERRORS, OR STATEMENT OF POINTS PRESENTS NO MATERIAL QUESTION REQUIRING FURTHER REVIEW OF THE VOLUMINOUS ADMINISTRATIVE RECORD.

1. *First Specification of Error.*

The argument and authorities cited are the same as submitted on the previous appeal, *Ng Yip Yee v. Barber*, *supra*, and are disposed of by the decision in that case.

2. *Second Point of Error.*

This point is likewise founded on the passport argument and has been disposed of by the previous ruling of the Court.

3. The *Third Point* is not mentioned.

4. *Fourth and Fifth Specifications of Error.*

Appellant makes nothing of these specifications and neither does appellee. The hearings were reopened to permit appellant to present any evidence.

5. *Point Six.*

Appellant has never been admitted to the United States. There has been no determination of his citizenship prior to the final determination of the Attorney General that he is an *alien*. *Choy Yuen Chan v. United States*, 30 F. 2d 516, cited by appellant under this point is a deportation *expulsion* proceeding and has no bearing upon this case.

6. *Point Seven.*

Appellant makes no point here other than his dissatisfaction with the ruling of the Court.

7. *Errors Eight and Nine.*

Appellant likewise here asks the Court to disagree with the hearing officer, the Board of Immigration Appeal, and the Court below.

The finding of fact of the executive department is conclusive.

United States v. Ju Toy, supra;

Quon Quon Poy v. Johnson, supra.

The Courts have no power to interfere unless there was—

(a) a denial of a fair hearing,

Chin Yow v. United States, 208 U.S. 8.

(b) the finding was not supported by evidence,

American School of Magnetic Healing v. Mc-Nulty, 187 U.S. 90.

(c) there was an application of an erroneous rule of law,

Gegiow v. Uhl, 239 U.S. 3;

Ng Fung Ho v. White, 259 U.S. 276.

8. *Errors Ten, Eleven and last point of Error.*

Appellant's argument and citation of authority under the above points have added nothing which requires further consideration.

Jow Chu Yun v. Barber, supra.

CONCLUSION.

It is respectfully submitted that appellant was afforded a full and fair hearing on his claim to citizenship. The Court below has reviewed the record in accordance with Title 8 U.S.C. 1503(c) and affirmed the final determination of the Attorney General adverse to appellant. The order of the Court below should be affirmed.

Dated, San Francisco, California,

May 20, 1955.

LLOYD H. BURKE,

United States Attorney,

CHARLES ELMER COLLETT,

Assistant United States Attorney,

Attorneys for Appellee.

No. 14,592

IN THE

United States Court of Appeals
For the Ninth Circuit

WALLACE HIGA, Administrator of the
Estate of Takeichi Higa,

Appellant,

VS.

TRANSOCEAN AIRLINES, a corporation,

Appellee.

Upon Appeal from the United States District Court
for the District of Hawaii.

BRIEF OF TRANSOCEAN AIR LINES, INC., APPELLEE.

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FILED

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No. 14,592

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WALLACE HIGA, Administrator of the
Estate of Takeichi Higa,

Appellant,

vs.

TRANSOCEAN AIRLINES, a corporation,

Appellee.

Upon Appeal from the United States District Court
for the District of Hawaii.

BRIEF OF TRANSOCEAN AIR LINES, INC., APPELLEE.

STATEMENT OF THE CASE.

This appeal is by Wallace Higa, plaintiff and appellant, from an order of the trial court granting the motion of Transocean Air Lines, Inc., defendant and appellee, to dismiss an action filed on the "law side" of the court, on the ground that the court lacked jurisdiction of the matters alleged in the complaint. As stated by appellant in his "statement of the case", the case was decided on the pleadings.

Appellant's summary of the allegations of the complaint is essentially correct.

SUMMARY OF ARGUMENT.

The issue involved.

The sole issue involved is the proper construction of Section 1 of the Death on the High Seas Act: do actions thereunder lie exclusively in admiralty?

The text and legislative history.

The plain words of the Act show the exclusive remedy is in admiralty. This is confirmed by the legislative history.

The authorities discussed.

The most exhaustive discussion of the question at issue is to be found in *Wilson v. Transocean Air Lines*. As there pointed out, the early cases all held the action lay exclusively in admiralty. In 1938 there arose a line of New York State cases, beginning with *Elliott v. Steinfeldt*, the reasoning of which is shown to be erroneous. Likewise erroneous is the reasoning in the *Choy* case, the first Federal decision permitting an action at law. The latest case from New York, *Iafrate v. Compagnie Generale Transatlantique, etc.*, repudiates these decisions.

All the decisions in this Circuit, including an early opinion of this Court, the *Silverpalm*, and several recent decisions of local District Courts hold the action lies exclusively in admiralty.

The argument based on the word "may" is a false issue.

The option conferred by the statute is an option to sue, not an option as to where suit may be brought. This is confirmed by other sections of the Act, and

by related statutes. The cases relied on by appellant are shown to be not in point.

The “saving to suitors” clause is in no way involved.

The “saving to suitors” clause merely preserves other remedies already existing. No remedy other than the Federal Act exists in this case. The “saving” clause is therefore not involved.

Appellant’s cases discussed and shown not to be in point.

Conclusion.

The judgment of the trial court should be affirmed.

ARGUMENT.

I.

THE ISSUE INVOLVED.

In his opening brief, appellant specified some four alleged errors upon which he relies on this appeal. Upon examination, these four specifications of errors are seen to be essentially identical; that is, in substance they all complain of the action of the trial court in ruling that an action founded upon the Death on the High Seas Act (46 U.S.C.A., para. 761-767) must be commenced and prosecuted in admiralty, and that there is no jurisdiction in the court, sitting on the “law side”, to entertain such an action.

It is appellee’s position that the trial court’s ruling was correct, that is, that an action based on the Death on the High Seas Act must be commenced in

admiralty. It is appellant's position, apparently, that this Act simply creates a cause of action and "sets it at large", and that it may be enforced in any court of general jurisdiction, including State courts and the "law side" of the Federal Court.

Appellant seeks to support his position in some three ways:

(1) by the citation of authority to the effect that State courts, or the law side of Federal courts, have jurisdiction to hear Death on the High Seas Act cases (Appellant's Opening Brief, pp. 11-15);

(2) by the argument that the words "*may* maintain a suit for damages in the district courts of the United States, in admiralty" are purely "permissive", not "mandatory", and thus do not forbid maintaining such action in a State court or on the law side of a Federal court; in this connection, appellant argues that a grant of jurisdiction (in this case to the Federal Court in admiralty) should not be construed as exclusive "by implication only" (Appellant's Opening Brief, pp. 11-20);

(3) by the argument that the "saving to suitors" clause (28 U.S.C.A. para. 1333) in the Judicial Code in some way grants appellant the right to bring an admiralty cause of action in a State court or on the law side of a Federal court (Appellant's Opening Brief, pp. 6-11).

Appellee believes that two of the above propositions, namely, (2) and (3), are false issues, and represent a basic confusion in appellant's mind in this case, a confusion perhaps responsible for this appeal.

We submit that there is simply one issue in this case, the proper construction of Section 1 of the Death on the High Seas Act (46 U.S.C.A., Sec. 761), and in particular the construction of the language "may maintain a suit for damages in the district courts of the United States, in admiralty . . ." The issue is: does this Section both create a cause of action and delimit the forum in which it may be enforced, or does it simply create a cause of action and "set it at large", to be enforced in any court of general jurisdiction in which plaintiff chooses to sue? This is purely a question of statutory construction. There can be no question that Congress, in creating the cause of action, *could* have limited its enforcement simply to the admiralty courts; likewise, there can be no question that Congress, had it so wished, *could* have authorized the enforcement of the cause of action so created in any court of competent jurisdiction. The question is: what *did* Congress do? We submit that the language of the statute, its legislative history, the better reasoned cases construing the statute, and all pertinent analogies from other statutes demonstrate conclusively that Congress intentionally and expressly limited the enforcement of the cause of action so created to the admiralty courts.

II.

THE LANGUAGE AND LEGISLATIVE HISTORY OF THE ACT
DEMONSTRATE THAT IT CREATES A RIGHT OF ACTION
WHICH LIES EXCLUSIVELY IN ADMIRALTY.

It is rather strange, in view of the plain wording of the Act, that there could have been any doubt that the cause of action created by it lies exclusively in Admiralty. The first section of the Act (46 U.S.C.A. Section 761) provides:

“Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia or the Territories or dependencies of the United States, the personal representative of the decedent *may maintain a suit for damages* in the district courts of the United States, *in admiralty*, for the exclusive benefit of the decedent’s wife, husband, parent, child or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.”
(Emphasis added.)

Before the Act was enacted no right of action for death occurring on the high seas existed. The Act created the right of action, which did not exist before, and attached certain limitations upon the right so created. By elementary principles, the cause of action so created exists and may be prosecuted only in conformity with the conditions and limitations set forth in the statute creating it. The Act states that “the personal representative of the decedent may maintain a suit for damages in the district courts of the United

States, in admiralty . . .” If plain English is to be given effect, this means the action must be maintained in Admiralty.

The clear meaning of the plain words of the Act is confirmed if we look at its Congressional history. The Act, enacted on March 30, 1920, was passed by the House of Representatives on March 17, 1920. The discussion in the House on that day concerning this bill is to be found in the Congressional Record, Volume 59, Part V, pages 4482 through 4487. We particularly call to the attention of the Court the following excerpted passages:

“Mr. Igoe. Does not the gentleman think that he should inform the gentleman from Ohio (Mr. Ricketts) that *this proceeding will be in admiralty* and that there will be no jury, so that no Member of the House may have any misunderstanding about it? That question was thrashed out and it was decided best not to incorporate into this bill a jury trial *because of the difficulties in admiralty proceedings.*” (Page 4482. Emphasis added.)

“Mr. Moore of Virginia. . . . The purpose of this bill, as I understand it, is to give exclusive jurisdiction to the admiralty courts where the accident occurs on the high seas.

Mr. Volstead. That is it.

Mr. Moore of Virginia. If that be true, if you give exclusive jurisdiction, there seems to be no necessity for at least a part of Section 7, and it therefore appears that in order to remove any doubt as to the exclusive jurisdiction of the admiralty courts, if that is what is desired, that there shall be inserted in section 1 language that

will make the exclusive jurisdiction of the admiralty courts clear.

The courts may take the view that as the bill deals with accidents on the high seas and also with accidents within the territorial limits of the States, that even as to causes of action arising on the high seas the admiralty courts and State courts are to have concurrent jurisdiction. If that view is to be avoided, it strikes me that there could be placed easily in the first section of the bill language that would place the point beyond peradventure of a doubt. I have only seen the bill in the last few moments, and am only stating an impression.

Mr. Montague. May I suggest——

Mr. Volstead. I yield to the gentleman.

Mr. Montague. In reply to the statement of my colleague (Mr. Moore) I will say that jurisdiction upon this subject is found in the Constitution of the United States, and it has been held over and over again by our courts that when the Congress legislates in pursuance of constitutional authority such a law is exclusive. It requires no asseveration in the bill to make it exclusive. It is exclusive by virtue of its superior jurisdiction; therefore, I submit, it is needless to amend this bill now and raise the chance of its defeat by adding a mere adjective when by the very force of the Constitution and the law in pursuance thereof it is inherently and necessarily exclusive.

Mr. Volstead. My impression is it would be exclusive upon the theory the gentleman (Mr. Montague) suggests." (Page 4483.)

"Mr. Dewalt. In order to remove any doubt as to that, does not the chairman of the Commit-

tee on the Judiciary believe it would be wise, in section 1, to state that the admiralty courts of the United States do have exclusive jurisdiction in such cases? That would clear that down.

Mr. Volstead. The view taken by the parties who drew this bill is that *it is exclusive*, because, as the gentleman from Virginia (Mr. Montague) pointed out, the power to pass laws on this subject is conferred on Congress in the Constitution, and whenever Congress acts I have no doubt it excludes the power on the part of the State to pass laws on the same subject." (Page 4485. Emphasis added.)

"Mr. Montague. This bill has been killed three or four times in other Congresses on three grounds: One, that it embraced the Great Lakes and inland waters; the second, that it did not provide for a jury trial; third, that there was no limitation upon the liability of shipowners, and that there ought to be such a limitation. These three objections, in some form or another, have been interjected heretofore to kill this very meritorious legislation. This bill as now worked out is not perfect, and no legislation is perfect, but certainly in the minds of the committee it is legislation that we would generally consider most wholesome and righteous for mankind. (Applause.)" (Page 4486.)

See also the Committee Reports: Senate Report 216, and House Report 674, 66th Congress.

III.

THE CASES IN THIS CIRCUIT AND THE BETTER REASONED CASES ELSEWHERE CONFIRM THAT THE ACTION LIES EXCLUSIVELY IN ADMIRALTY.

The decision of the courts upon this question (that is, do suits under the Act lie exclusively in admiralty) have developed into two lines of authority—one line finding that they do, the other that they do not.

By far the most thorough and scholarly discussion of this entire question is to be found in the opinion of Judge Goodman in the case of *Wilson v. Transocean Airlines*, April 15, 1954, 121 Fed. Supp. 85, at pp. 93-98, dealing with this very question in a case arising out of the same accident as here involved. This opinion deals so cogently with the various arguments urged by appellant in his Opening Brief, and is so valuable a contribution to the subject, that we have reprinted the relevant portion as an Appendix to this brief. See Appendix.

As Judge Goodman points out in his opinion, the earliest cases stated categorically that the suit must be in admiralty. See *Dall v. Cosulich Line*, 1936 A.M.C. 359 (S.D.N.Y. 1928); *Birks v. United Fruit Co., Inc.*, 48 Fed.(2d) 656 (S.D.N.Y. 1930); *Echavarria v. Atlantic & Caribbean Steam Nav. Co.*, 10 Fed. Supp. 677 (E.D.N.Y. 1935); *The Mohawk*, 1938 A.M.C. 396 (Surrogates' Court of Kings County New York 1938).

Thus, in *Birks v. United Fruit Co., Inc.* (1930) U.S. Dist. Ct., S.D.N.Y., 48 Fed.(2d) 656, an early case to consider the question, the court granted de-

fendant's motion to dismiss a complaint as not sufficient on any of a number of theories. As if stating a self-evident proposition, the court said: "It cannot be regarded as having been brought under the Death on the High Seas Act, Section 1 (46 U.S.C.A., Section 761) because the action is at law". (Page 656.)

The next court to consider the subject felt the answer so clear that it need cite only the language of the act. See *Echavarria v. Atlantic and Caribbean Steam Nav. Co.* (1935) U.S. Dist. Ct., E.D.N.Y., 10 Fed. Supp. 677, where the court dismissed an action brought on the law side of the United States District Court, simply referring to the language of the statute.

In 1938, however, (some eighteen years after the Act was enacted) a New York State court in *Elliott v. Steinfeldt*, App. Div. 1938, 4 N.Y. Supp.(2d) 9, reversing the trial court, held, in a brief memorandum opinion, that State courts had concurrent jurisdiction to enforce this cause of action, stating ". . . the right to maintain the action in the state courts, which had long existed under the Judiciary Act of 1789 was not necessarily affected by the Federal statute." The court sought to distinguish the *Echavarria* case as holding only that the Federal law superseded State law as to the *substantive* rights of the parties, but not passing on the question of the proper forum. As Judge Goodman points out in his opinion, the basic premise of the New York court was erroneous: State courts had *never* enjoyed jurisdiction to enforce the *Federal* right of action; only State rights of actions had been enforced, and these only in a few cases. In

addition, the court misconstrued the *Echavarria* case, in which, as pointed out above, a common law action, purportedly based on the Act, was *dismissed—because* not commenced in admiralty.

The *Elliott* case was followed, without further consideration or independent reasoning, in several subsequent New York State cases.¹

Only three Federal cases have ever held that a suit might be maintained at law under the Death on the High Seas Act. Appellant relies heavily upon the first of these, *Choy v. Pan American*, U.S. District Court, S.D.N.Y. 1941, 1941 Aviation Reports 10, 1941 A.M.C. 483 (not officially reported). As appellant's lengthy quotation shows,² Judge Clancy in that case relied on the supposed analogy of the decision of the Supreme Court in *Panama R. R. Co. v. Johnson*, 1924, 264 U.S. 375, construing the Jones Act, enacted at the same session of Congress as the Death on the High Seas Act. Judge Clancy also adverted to the use of the word "may" in the statute and argued it should not be construed to mean "shall". (This argument, heavily relied upon by appellant here,³ will be discussed at length below.)

In the *Panama R. R. Co.* case, the Supreme Court stated that the right of action given seamen by the Jones Act might be enforced in admiralty, although that act merely provided that the right of action might be maintained in a suit at law.

¹Cited in Appellant's Opening Brief, at p. 15.

²At pp. 12-14 of his Opening Brief.

³At pp. 16-18 of his Opening Brief.

As Judge Goodman so convincingly shows (121 Fed. Supp. 85, at 96-97) the two situations are not in fact analogous. The Supreme Court's interpretation of the Jones Act was admittedly governed by the desire to avoid, if possible, a grave constitutional question; no such question is present in this case. Likewise, there is a great difference between: (1) the proposition that, in view of the ancient and traditional jurisdiction of the admiralty courts for maritime torts and wrongs, a statute which expressly creates a new maritime cause of action together with a right to a common law trial, also contemplates that said right of action may be enforced in admiralty, the traditional forum; and, on the other hand, (2) the very different proposition that a statute which in terms authorizes only an admiralty proceeding for a maritime wrong, contemplates a common law remedy which previously did not exist.

Lastly, Judge Clancy notwithstanding, it does not seem in any way "anomalous" to hold that under the Jones Act and the Death on the High Seas Act, "seamen had a common law action for death and other victims of injuries on this same ship had not" where the very same Congress had, in the Jones Act, expressly provided for a right of action at law, and, in the Death on the High Seas Act, had omitted any such provision but instead provided only that claimants "may maintain an action . . . *in admiralty*." Rather, the strikingly different language used by the same Congress suggests that Congress had the problem very much in mind, and intended different results to flow from this very different language.

In *Batkiewitz v. Seas Shipping Co.*, 1943, U.S. Dist. Ct., S.D.N.Y., 53 Fed. Supp. 802, the court relied upon *Elliott v. Steinfeldt* and the *Choy* case in granting a motion to amend a complaint to add a cause of action under the Death on the High Seas Act in an action brought at law under the Jones Act; it is significant that under the facts of that case, had the court denied leave to amend, plaintiff's action under the Death on the High Seas Act would have been barred by the statute of limitations.

The third case, *Sierra v. Pan American World Airways, Inc.*, U.S. Dist. Ct., Puerto Rico, 1952, 107 Fed. Sup. 519 (in which the judge in passing erroneously stated that diversity of citizenship as well as a "Federal right of action" were necessary for jurisdiction) merely relied on the prior decisions.

The remaining cases cited by appellant⁴ are not in point. *Bugden v. Trawler Cambridge, Inc.*, Sup. Jud. Ct. of Mass., 1946, 65 N.E.2d 533, as shown by Judge Goodman, did not involve even dictum in support of appellant. *Powers v. Cunard S.S. Co. Ltd.*, 1925, 32 Fed.(2d) 720, and *The Saturnia*, 1946 A.M.C. 469 (U. S. District Court S.D.N.Y. 1936) involved rights of action created by *foreign law*, and did not involve a right of action created by Section 1 of the Death on the High Seas Act, the section here in question.

Thus, as Judge Goodman demonstrated, only eight decisions, five in the State courts of New York and three Federal cases (two in the Southern District of

⁴At p. 15 of Appellant's Opening Brief.

New York), hold that the action may be maintained at law, and of these eight, only *two* are based upon independent reasoning. It is highly significant that, except for the *Sierra* case, arising in Puerto Rico, this line of authority appears never to have been followed outside of New York. It is further most significant that the latest case from New York dealing with this question, *Iafrate v. Compagnie Generale Trans-Atlantique*, U.S. Dist. Ct., S.D.N.Y., 1952, 106 Fed. Supp. 619 expressly refused to follow these cases but instead held that the Act *meant what it said*, that is, that the suit must be commenced in admiralty.

The cases in this Circuit are unanimous in this result. The earliest and most important case, though factually distinguishable, is *The Silverpalm*, 1935, CCA-9, 79 Fed.(2d) 598, a unanimous decision of this Court on an appeal from the United States District Court for the Northern District of California, Southern Division. In that case certain United States Naval officers were killed in a collision between a United States naval vessel and a British ship, the *Silverpalm*. The personal representatives of the officers filed a libel in admiralty against the ship. The shipping company then filed a petition to limit liability, and the District Court issued an injunction enjoining all further suits and further action in pending suits. The personal representatives then moved the court to modify the injunction to permit them to proceed against the shipping company, and the District Court so ordered, authorizing the administrators to "file suit in personam at law". On appeal, this Court

rather shortly pointed out (at page 600) that “46 U.S.C.A., Section 764, *supra*, permits suits under foreign law for such deaths only to be ‘maintained in an appropriate action in admiralty’ ”. The Court then criticized the District Court for failing to make findings which in the words of the Court of Appeals:

“ . . . quite likely would have suggested to it the distinction between a cause of action based on the British statute, concerning which its decision might have permitted a suit otherwise than in the limitation proceeding, *and a cause of action arising from the United States Statute which at that stage in the litigation, at any rate, should have been confined to the limitation proceeding and, in any event, for death caused on a United States naval vessel outside state territorial jurisdiction, in admiralty.* Furthermore, in a case of first impression, involving the important question here presented, the writing of an opinion in accordance with the long-established practice in admiralty in this district *would have concentrated the mind of the court on the terms of the United States death statute involved*, with its provision that whatever rights the foreign law may confer are to be ‘maintained in an appropriate action *in admiralty.*’ ” (Page 600; Emphasis added.)

The *Silverpalm* case was relied upon by Judge Wiig, the trial court in this case, in his opinion granting appellee’s motion to dismiss. (See Tr. p. 18, at line 22.)

The District Courts in this Circuit have likewise unanimously reached this result, all in cases arising out of the very accident here involved. See the opin-

ion of Judge Goodman, previously referred to, in *Wilson v. Transocean*, 121 Fed. Supp. 85; and the opinion of Judge Wiig in *Higa v. Transocean*, 1954, 124 Fed. Supp. 13 (Tr. p. 18-23). In *Baker v. Transocean*,⁵ Judge George Harris dismissed an action brought on the law side of the court for want of jurisdiction, relying on Judge Goodman's opinion in the *Wilson* case. Judge Oliver Hamlin likewise ordered two actions dismissed, because not commenced in admiralty, in the cases of *Wheeler v. Transocean*⁶ and *Garrison v. Transocean*.⁷

Thus in all reported cases, save for a line of cases originating in New York and now repudiated even there in the latest case from that area⁸, the courts have held, in accord with the plain wording of the Act and its legislative history, that the right of action created must be enforced in the prescribed forum, in admiralty.

⁵No. 33265 (Civil) in the United States District Court, Northern District of California, Southern Division, Order of Dismissal dated May 12, 1954.

⁶No. 33267 (Civil) in the United States District Court, Northern District of California, Southern Division, Order of Dismissal dated June 14, 1954.

⁷No. 33250 (Civil) in the United States District Court, Northern District of California, Southern Division, Order of Dismissal dated June 8, 1954.

⁸*Iafrate v. Compagnie Generale Atlantique*, S.D.N.Y., 1952, 106 Fed. Supp. 619, discussed above.

IV.

THE ARGUMENT BY APPELLANT THAT THE WORD "MAY" IS "PERMISSIVE" RATHER THAN "MANDATORY" IS A FALSE ISSUE.

Appellant argues that the word "may" as used in Section 1 of the Act should be given "its usual discretionary meaning" and be held to be "permissive" only, and that to hold that the action may only be brought in admiralty would be to construe the word "may" as "mandatory." Had that been desired, so appellant argues, the word "shall" would have been used.

In our opinion, this injects a completely false issue. In one sense, of course, the word "may" is used in the statute in a permissive sense: the claimant "may" sue, if he so elects; if he does not wish to sue, he need not. It would be manifestly inappropriate for Congress to say that "*whenever* the death of a person shall be caused by wrongful act . . . the personal representative of the decedent" *shall* (that is, must) sue. The option afforded the claimant, however, is the option to sue, not an option as to where suit may be brought; as to that, Congress says most explicitly the suit "may be maintained . . . *in admiralty*."

Contrary to appellant's suggestion, appellee is not trying to limit jurisdiction "by implication"; rather, it is appellant who is trying to insert into the Act words which are not there, to amend it to read "may maintain an action . . . in admiralty [or in any other court of general jurisdiction]"; appellant seeks to

infer the inserted language all from the one word "may".

Appellant argues that where Congress intended to grant no option, Congress used the word "shall"; to "prove" this, appellant refers to other sections of the Act itself, and to neighboring sections of Title 46 of the U. S. Code.

This test of resort to comparable sections of the Act and related statutes is a fair one, but it does not support appellant. Thus, Section 3 of the Act (46 U.S.C.A. Section 763) refers to "securing jurisdiction of the vessel, person, or corporation sought to be charged" and clearly contemplates an action only in admiralty. Section 4 (46 U.S.C.A. Section 764), dealing with causes of action created by foreign law, again refers to the maintenance of a right of action "in an appropriate action *in Admiralty* in the Courts of the United States" Section 5 (46 U.S.C.A. Section 765), authorizing the substitution of a personal representative in the event an injured claimant dies pending suit, specifically says: "If a person die as the result of such wrongful act, neglect, or default as is mentioned in Section 761 of this Title *during the pendency in a Court of Admiralty* of the United States of a suit to recover damages for personal injuries"; had Congress thought suits under the Act could be brought in non-admiralty courts, there would have been no reason to so limit the right of substitution to admiralty cases. It is significant likewise that Section 766, providing that contributory

negligence does not bar recovery but instead simply reduces its amount, states a typical Admiralty rule.

It is instructive to test the challenge of appellant (that the word “may” cannot be used in what he characterizes as a “mandatory” sense) by applying it to the very sections appellant has chosen to refer to,⁹ namely, section 2 (46 U.S.C.A. 742) of the Act entitled “Suits in Admiralty By Or Against Vessels Or Cargoes of U.S.” and Section 1 (46 U.S.C.A. Section 781) of the act entitled “Suits in Admiralty Against U.S. for Damages Caused By and For Towage or Salvage Services.” Section 742 provides:

“In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, *a libel in personam may be brought* against the United States or against any corporation mentioned in section 741 of this title, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation.” (Emphasis added)

The words “a libel in personam *may* be brought against the United States” almost exactly correspond to the words of the section here in question (save that in our case, the words “in admiralty” are *expressly* added). Could appellant contend that the word “may” in this section is “permissive”, and that a claimant, at his option, may bring a “libel in per-

⁹At p. 20 of his Opening Brief.

sonam” in a State court or on the law side of a federal court? The question answers itself.¹⁰ See also Sections 781 and 783:

“§ 781. A *libel in personam in admiralty* may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided*, that the cause of action arose after the 6th day of April, 1920.”

“§ 783. In the event of the United States filing a libel in rem or in personam in admiralty for damages caused by a privately owned vessel, the owner of such vessel, or his successors in interest, may file a *cross libel in personam* or claim a set-off or counterclaim against the United States in such suit for and on account of any damages arising out of the same subject matter or cause of action: . . .”

Here likewise “a libel in personam in admiralty *may* be brought against the United States . . .” and, if the United States file a libel in rem or in personam in admiralty, “the owner of such vessel . . . *may* file a cross-libel in personam . . .” Would appellant contend that in these sections, which he himself has argued are *in pari materia*, a decision that the “libel in personam in admiralty” there authorized could

¹⁰Lest appellant in desperation argue that Section 742 *can* be construed to authorize an action at law, we refer to *Johnson v. U. S. Shipping Board*, 1930, 280 U.S. 320, holding that the remedy under that section lies exclusively in admiralty.

properly be brought *only* in an admiralty court would improperly construe the word “may” as “mandatory”?

The above shows that this entire argument is a false issue. Section 761 corresponds to Section 742 and Section 781 in both form and meaning. All three sections use the word “may”, and clearly all three contemplate only actions in admiralty.

If further example be needed, the most obvious that comes to mind is that afforded by the antitrust laws of the United States. Section 4 of the Clayton Act¹¹ (15 U.S.C.A. Sec. 15) provides:

“Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws *may sue therefor in any district court of the United States* in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.” (Emphasis added.)

Nothing is clearer than that the courts have held that this section authorizes *only* suits in the Federal courts, and that these courts have *exclusive* jurisdiction of antitrust treble damage suits. See *General Investment Company v. Lake Shore and M. S. R. Co.*, 1922, 260 U. S. 261; *D. E. Loewe & Co. v. Lawlor*,

¹¹Following the wording of Section 7 of the Sherman Act as originally enacted (26 Stat. 210).

Circuit Ct., D. Conn. 1904, 130 Fed. 633; *Freeman v. Bee Machine Co., Inc.*, 1943, 319 U.S. 448.

Appellant further argues that "jurisdiction of federal courts is not to be construed as being exclusive by implication only", and in support thereof cites three cases, *Galveston H. & S. R. Co. v. Wallace*, 223 U.S. 481, *U.S. v. Bank of New York and Trust Co.*, 296 U.S. 463, and *Castle & Cook Terminals v. Local 137*, etc., 1953, U. S. District Court of Hawaii, 110 Fed. Supp. 247.

These cases, however, do not remotely deal with the problems here involved, and the language quoted from them by appellant is in each case torn from its context. Thus, the *Wallace* case involved a suit in a state court for failure to deliver goods by an interstate carrier. The defendant argued that jurisdiction over complaints made by persons alleging they were damaged by a "violation" of the Interstate Commerce Act lay exclusively in the Federal Court, in view of Section 8 of that Act which, as summarized by the Supreme Court, provided that "persons damaged by a *violation* of the statute 'might make complaint before the commission . . . or in any district or circuit court of the United States'" (emphasis by the Supreme Court). Defendant further argued that an earlier Supreme Court opinion supported that contention. The Court, however, distinguished that earlier case and Section 8 from the case before it on the ground that "damage caused by failure to deliver goods is in no way traceable to a *violation of the statute*, and is not, therefore, within the provisions

of § 8 and 9 of the act to regulate commerce" (223 U.S. 481, at 490). The Court, thus, did not—as appellant says—construe the language "might make complaint in the United States District Court" but instead held that that section was *not involved*. The action involved was one for failure to deliver freight entrusted to a carrier, and was not one *created* by Federal statute and not previously existing; the Court simply held that the enactment of a Federal statute did not oust the State courts of jurisdiction which they had already had to enforce independently existing causes of action.

In view of the completely different factual situation and legal issues presented, it is surprising that appellant should cite *U. S. v. Bank of New York & Trust Company*. In that case, the New York State Insurance Commissioner, acting pursuant to State statute, had in a State judicial action taken possession and control of the assets of certain Russian insurance companies, and was in the process of administering these assets and paying off claims against them. It appeared that in the case of certain of the companies, numerous claims had been filed in the State proceeding and were still pending. The United States, relying upon an assignment from Soviet Russia executed in 1933, brought an action in a Federal District Court for an accounting and delivery of these funds to it. The defendants moved to dismiss, relying on the fact that the State court had first assumed jurisdiction as to these assets. The Supreme Court affirmed the dismissal, holding the Government's suit was in rem

and that the State court had first assumed jurisdiction in rem. The Government then argued that it was the plaintiff and was entitled to sue in its own courts, under the provision of the Judicial Code granting the United States District Court jurisdiction for suits by the Government. It was in answer to this contention that the Court used the language quoted by appellant,¹² the Court pointing out that the section conferring jurisdiction in the Federal District Court to entertain suits by the Government did not purport to be exclusive, and that the United States did have power to sue in the State court. The Court held the District Court had properly exercised its discretion in declining to exercise jurisdiction in the particular case, in view of the fact that the State court had already acquired jurisdiction of the res in question, that the claims of many claimants were still pending in the State court, that these claimants would have been indispensable parties to any disposition of the fund by the Federal Court, and that to so remit the United States to the State court would not make it a "defendant" there, since it would be in the State court solely to assert an affirmative claim. How this case supports appellant's position, we do not see.

Castle & Cook Terminals v. Local 137, U.S. Dist. Ct., Hawaii, 1952, 110 Fed. Supp. 247, is likewise not in point. That was an action against a labor union for breach of contract, brought in a territorial court. Defendant apparently tacitly admitted such rights of

¹²At p. 19 of Appellant's Opening Brief.

action had traditionally existed, but sought to remove the case to the District Court, arguing that the Taft-Hartley Law now authorized such action, and that Congress had "fully occupied" the field, so that the remedy *now* was exclusively federally created. The court granted a motion to remand, indicating that no intention to exclusively occupy the field and abrogate previously existing State remedies could be inferred from the statutory language, and in this connection used the language appellant quoted. The holding of the case is thus based on the *existence of a State-created remedy*; there is not even a contention in this case that such a remedy exists.

V.

THE "SAVING TO SUITORS" CLAUSE OF THE JUDICIAL CODE IS IN NO WAY INVOLVED IN THIS CASE.

The right to recover for wrongful death, either on land or on the high seas, is purely statutory; there was no common law right of action to recover for a death on the high seas. *The Harrisbury*, 119 U.S. 199. It was to remedy this condition that in 1920 Congress enacted the Federal Death on the High Seas Act (46 U.S.C.A. Sections 761-767). In his complaint, plaintiff alleged facts bringing his case within that Act.¹³ Plaintiff's right to recover is thus based solely

¹³Plaintiff's complaint, paragraph VI, Tr. p. 6:

"... and while on the high seas, about 300 to 400 miles out of Wake Island in the direction of Hawaii, said plane fell and crashed into the Pacific Ocean."

on this Federal Act; no other basis for recovery has been or could be alleged. This sole reliance on the Death on the High Seas Act is both explicit and implicit in appellant's Opening Brief.

In view of this fact, it can be seen that the "saving to suitors" clause¹⁴ does not bear on this case. The "saving" clause is simply that: "it *saves*" (that is, preserves) to suitors "all other [existing] remedies to which they are *otherwise* entitled". It, in itself, *creates* no new remedies at all. In this case the sole remedy is the Federal Death on the High Seas Act. No other remedies existed, and thus there were no "other remedies" to be "saved". We believe the matter is as simple as that.

The cases cited by appellant in support of the supposed proposition that the "saving" clause in some way confers jurisdiction upon State courts and the law side of Federal courts to enforce rights of action which they otherwise could not enforce, do not support that proposition.

Thus, *Madrugá v. Superior Court*, 1954, 346 U.S. 556, involved an action to partition a vessel brought in a State court. It was not denied that in general the State court had jurisdiction to hear and deter-

¹⁴28 U. S. C. A. Section 1333:

"Admiralty, maritime and prize cases.

"The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

"(1) Any civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled.*"

mine partition suits, but defendant contended that the ship was a “maritime object” and that this fact in some way defeated the general jurisdiction of the State court and conferred exclusive jurisdiction in admiralty. The Supreme Court rejected this contention and, in so doing, used the language quoted by appellant.¹⁵ The *Madruga* case thus does not remotely support the proposition appellant seeks to draw from it. It would be similar to our case only if: (1) the right to partition had *not* existed under State law, (2) such right was first *created* by an Act of Congress (3) which expressly required enforcement in an admiralty court.

Likewise irrelevant is *Seas Shipping Co. v. Sieracki*, 1946, 328 U.S. 85, where, in an action brought on the law side of the Federal court, it was held that the doctrine of unseaworthiness applied in favor of stevedores, as well as seamen. Defendant shipowner had urged “that the *doctrine* of unseaworthiness is peculiar to admiralty and cannot be applied in a suit brought on the law side of the court” (328 U.S. 85, at 88, emphasis added), and it was in answer to this contention that the court used the language quoted by appellant.¹⁶ Thus, the *Sieracki* case likewise was not a case of the court enforcing “at law” a statutory cause of action, *created* by a statute expressly providing that it be enforced in admiralty; no statute

¹⁵At pp. 7-8 of Appellant’s Opening rBrief.

¹⁶At p. 8 of Appellant’s Opening Brief.

of any kind was involved. The court simply applied in a case at law brought by a stevedore a *doctrine* hitherto recognized in admiralty situations in the case of seamen.

In *Pope and Talbot, Inc. v. Hawn*, 1953, 346 U.S. 406, the court applied the Sieracki doctrine in an action at law brought by a carpenter against a ship-owner. No challenge was made to the jurisdiction of the court; rather, the defendant urged that the *State substantive* law of contributory negligence should be applied. This contention was rejected by the Court, which pointed out the plaintiff was suing, not on a claim created by State law, but on a "maritime tort" "rooted in federal maritime law" (346 U.S. 406, at 409), and in this connection used the language quoted by appellant.¹⁷ The case is in no way similar to ours.

Hall-Scott Motor Car Co. v. Universal Ins. Co., 1941, 122 Fed.(2d) 531 was a suit at law against a bailee, to recover the value of property destroyed while in the bailee's possession, the bailee relying upon a waiver of liability clause in the bailment contract. The court held that the contract was a "maritime contract", being for the repair of a vessel, and that its validity was to be determined by admiralty principles, rather than by state law. Here again, the cause of action sued on was not created by a statute

¹⁷At p. 10 of Appellant's Opening Brief.

but has long been within the jurisdiction of law courts. The case is not remotely in point.

Appellant did not feel the remaining cases he cited in this connection (at p. 9 of his Opening Brief) merited discussion, nor do we. None of them involve factual situations or legal issues at all parallel to this case.

The above demonstrates we are left where we were. Appellant has cited no authority holding that the "saving to suitors" clause in any way *creates* any new rights to sue in State courts or in actions at law in federal courts. The "saving" clause adds nothing, and might as well never have been mentioned.

CONCLUSION.

The above has demonstrated that the only issue in this case is the proper construction of Section 1 of the Death on the High Seas Act; that its plain wording and legislative history show that actions thereunder must be brought in admiralty; that this conclusion is supported by a decision of this Court, and several recent opinions of District Courts in this Circuit, as well as the better reasoned cases elsewhere; that the only contrary authority originated in New York, but the latest decision from New York repudiates that result, and follows the holdings in this Circuit; that this conclusion is fortified by the examination of comparable statutes; and that the "saving to suitors" clause is not involved.

In view of the above, the judgment of the trial court, dismissing the action for want of jurisdiction, should be affirmed.

Dated, San Francisco, California,
April 11, 1955.

Respectfully submitted,

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(Appendix Follows.)

Appendix.

Appendix

EXTRACT (pp. 93-98) FROM OPINION OF JUDGE GOODMAN IN
WILSON v. TRANSOCEAN, U.S. DIST. CT., N.D., CAL., 1954, 121
FED. SUPP. 85:

“ . . .

Since the federal Death on the High Seas Act affords a right of action for the death of plaintiff's husband, and that right is exclusive, the cause was properly removed to this court, if the Superior Court had jurisdiction to entertain it. Although the parties did not question the jurisdiction of the state court to entertain a suit under the Death on the High Seas Act, this court raised the question since it appeared to the Court from the language of the Act, that exclusive jurisdiction to entertain a suit under the Act was vested in the federal courts of admiralty. At the Court's request, the parties briefed the question with the result that defendant now contends that a suit under the Death on the High Seas Act lies solely within the admiralty jurisdiction, while plaintiff urges that the right given by the Act may also be enforced in a suit at law in the state or federal courts. If plaintiff is correct, the removed action could proceed in this court as a suit at law with right of trial by jury.³³ If defendant is correct, the action must be dismissed, inasmuch as this court acquired no jurisdiction by the removal of the action if the state court

³³If, of course, the complaint were amended to state that the action was brought by the plaintiff in the capacity of the decedent's personal representative.

had no jurisdiction to entertain it.³⁴ Such dismissal would, of course, be without prejudice to the filing of a new suit in admiralty, by the decedent's personal representative.

On its face, the language of the Death on the High Seas Act seems quite clearly to grant exclusive jurisdiction of actions under the Act to courts of admiralty. Section 1 of the Act provides as follows:

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

Thus, in a single sentence the statute both creates a right of action, which did not previously exist, and stipulates that the right is to be enforced in the federal courts of admiralty. The provision that enforcement is to be in admiralty is a limitation on the right itself.

Plaintiff urges that the use of the permissive expression 'may maintain a suit . . . in admiralty' is

³⁴General Investment Company v. Lake Shore & Michigan Southern Railway Company, 260 U.S. 261, 288 (1922); Lambert Run Coal Company v. Baltimore & Ohio Railroad, 258 U.S. 377, 382 (1922).

indicative of Congressional intent to *offer* the admiralty forum rather than to *withhold jurisdiction* from the courts of law. Such intent, plaintiff asserts, would be consistent with the general federal legislation saving to suitors the privilege of availing themselves of common law remedies for the enforcement of maritime rights.³⁵

But, this construction of Section 1 overlooks the fact that the word 'may' is not employed to designate a permissible forum but to grant a right of action. The statute says that the personal representative of the decedent 'may maintain a suit.' By these words the statute gives a right of action where none existed before. The use of a mandatory word such as 'shall' in this context would have been entirely inappropriate. The remainder of the sentence designating the forum is a qualification of the permission to maintain a suit.

Moreover, the construction offered by plaintiff would render the words 'in admiralty' mere surplusage. Yet, as plaintiff, herself, notes, 'no rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that significance and effect shall, if possible, be accorded every word in a statute.'³⁶ No express permission would have been necessary merely to open the courts of admiralty for the enforcement of the maritime right

³⁵1 Stat. 76 (1789); Rev. Stat. §711 (1875); 28 USC §1333 (1948).

³⁶Plaintiff's supplemental brief 5, quoting from *Chambers v. Robertson*, 183 F. 2d 144, 148 (App.D.C. 1950).

created by the statute. A suit to enforce a maritime right is a case within the admiralty jurisdiction. The District Courts of the United States have original jurisdiction of 'any civil case of admiralty or maritime jurisdiction.' 28 USC 1333.

Other language of the Death on the High Seas Act is also persuasive that suits under the Act are exclusively within the jurisdiction of the admiralty courts. Section 5 of the Act provides that:

'If a person die as a result of such wrongful act, neglect, or default as is mentioned in section 1 during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the recovery of the compensation provided in section 2 of this Act.'

If the Congress contemplated that suits enforcing the right of action given by the Death on the High Seas Act should be maintained in courts of law, there would have been no reason to limit the right of substitution granted in Section 5 of the Act to suits for personal injuries which were pending in the admiralty courts.

But it is unnecessary to rely solely on the statutory language for support for the conclusion that the right of action granted by the Death on the High Seas Act may be maintained only in admiralty. Both the Committee reports of the 66th Congress which enacted

the statute as well as the debate on the floor of the House make it clear that the framers of the Act intended to vest exclusive jurisdiction in the courts of admiralty. See Senate Report 216, House Report 674, 66th Congress; Vol. 9 Congressional Record, Part 5, pp. 4482-4486, 66th Congress.

It is also significant that the earliest decisions ruling upon the question of the forum in which the right of action granted by the Act should be enforced stated categorically that the suit must be in admiralty. [See *Dall v. Cosulich Line*, 1936 A.M.C. 359 (S.D.N.Y. 1928);³⁷ *Birks v. United Fruit Co.*, 48 F. 2d 656 (S.D.N.Y. 1930); *Echavarria v. Atlantic & Caribbean Steam Nav. Co.*, 10 F. Supp. 677 (E.D.N.Y. 1935); *The Mohawk*, 1938 A.M.C. 396 (Surrogates' Court of Kings County New York 1938).]

Indeed, the matter would seem too clear for question were it not for a line of cases which, beginning in 1938, some 18 years after the passage of the Act, have permitted suits under the Act at law. The first of these cases was *Elliott v. Steinfeldt*, 4 N.Y.S. 2d 9 (1938) in which the Appellate Division of the Su-

³⁷In the *Dall* case, the plaintiff in a suit at law asserted both a right of action founded on Italian law and the right of action given by Section 1 of the Death of the High Seas Act. The Court dismissed the complaint, holding that neither right of action could be maintained because the Italian law was not pleaded and because the right of action given by the Death on the High Seas Act could be enforced only in admiralty. Consequently, this decision constitutes a ruling on the forum in which the Section 1 right of action must be enforced, and should be distinguished from those cases involving the forum in which a foreign right of action may be enforced under the provisions of Section 4 of the Death on the High Seas Act. See note 40 *infra*.

preme Court of New York reversed a judgment of the trial court dismissing for want of jurisdiction an action at law under the Death on the High Seas Act. In a brief memorandum opinion the appellate court stated that: 'The Federal Death on the High Seas Act supersedes the state death statute, in so far as it creates and defines substantive rights arising out of wrongful death on the high seas. But the right to maintain the action in the state courts, which had long existed under the Judiciary Act of 1789 was not necessarily affected by the federal statute. Concurrent jurisdiction in federal and state courts to enforce rights granted by federal law is not uncommon. Where the state courts have long enjoyed jurisdiction over the subject matter of an action, jurisdiction is not withdrawn by federal statute unless such an intention is distinctly manifested. No such intent is discernible here.' This line of reasoning is founded on the faulty premise that the state courts of law had long enjoyed jurisdiction to enforce the federal right of action for wrongful death. The only right of action for death on the high seas which the state courts had ever enforced was such right as had been created by state statute. And the state statutes had been applied to deaths on the high seas in only a few scattered cases.³⁸ The issue is not whether the federal statute

³⁸For cases, in addition to the three previously referred to, in which a state wrongful death statute was applied to a death occurring on the high seas, see: *International Nav. Co. v. Lindstrom*, 123 Fed. 475 (2 Cir. 1903); *Southern Pacific Co. v. De Valle Da Costa*, 190 Fed. 689 (1 Cir. 1911); *Souden v. Fore River Shipbuilding Co.*, 223 Mass. 509, 112 N.E. 82 (1916); *The James McGee*, 300 Fed. 93 (S.D.N.Y. 1924).

purports to *withdraw* any pre-existing jurisdiction from the state courts, but whether the statute *withholds* from the state courts jurisdiction of an entirely new right of action.

The New York courts accepted jurisdiction of subsequent suits at law under the Death on the High Seas Act without further consideration, in reliance on the Elliott decision. See *Murphy v. Steinfeldt*, 4 N.Y.S. 2d 10 (1938); *Colbert v. Steinfeldt*, 7 N.Y.S. 2d 373 (1938); *Kristansen v. Steinfeldt*, 9 N.Y.S. 2d 790 (1939); *Wyman v. Pan American Airways, Inc.*, 1941 A.M.C. 912, *aff'd* 30 N.Y.S.2d 816 (1941).

In 1941, Judge Clancy in the United States District Court for the Southern District of New York, denied a motion to dismiss a suit at law under the Death on the High Seas Act, stating that the Act creates a right which may be asserted in a common law action. *Choy v. Pan-American Airways Company*, 1941 A.M.C. 483. Judge Clancy appears to have been largely persuaded by the decision of the Supreme Court in *Panama R.R. Co. v. Johnson*, 264 U.S. 375 (1924), interpreting the Jones Act which had been enacted some three months after the Death on the High Seas Act. In that case, the Supreme Court held that the right of action given to seamen by the Jones Act might be enforced in admiralty although the Act merely provided that the right of action might be maintained in a suit at law. In referring to the *Panama R.R. Co.* case, Judge Clancy states that: 'While that case presented the converse of the problem before us, much of its argument is

apropos here. The Jones Act gives seamen a right to recover for wrongful death. It, and the Death on the High Seas Act, were enacted by the same Congress and it would appear to be anomalous to hold that seamen had a common law action for death and other victims of injuries on the same ship had not.'

In my opinion, the Supreme Court decision in *Panama R.R. Co. v. Johnson*, interpreting the Jones Act, is an unreliable guide to employ in interpreting the Death on the High Seas Act. This is so because the Supreme Court's interpretation of the Jones Act was admittedly restricted by the necessity to avoid, if possible, a grave constitutional question. Happily the present problem in interpreting the Death on the High Seas Act is not complicated by any such restriction. Nor do I regard it as anomalous that the Congress which enacted the Death on the High Seas Act would enact another statute according the dependents of seamen a wider choice of forums in which to maintain an action for wrongful death. Traditionally different remedies have been available to seamen than to others suffering a maritime wrong. There are other differences between the remedies afforded by the Death on the High Seas Act and the Jones Act in addition to the difference in the permissible forums.³⁹

³⁹The Jones Act designates alternate beneficiaries; the Death on the High Seas Act provides for apportionment of the recovery among all the designated beneficiaries. The Jones Act prohibits certain defenses which the Death on the High Seas Act does not.

The two statutes had entirely different and distinct histories.⁴⁰

In a later case in the United States District Court for the Southern District of New York *Batkiewicz v. Seas Shipping Co.*, 53 F.Supp. 802 (1943), Judge Hulbert relied upon Judge Clancy's decision as well as the Elliott case, *supra*, in holding that an action under the Death on the High Seas Act could be joined with an action at law under the Jones Act.

The third federal decision upholding the jurisdiction of a court of law to entertain a suit under the Death on the High Seas Act also relies for support on the previous decisions. *Sierra v. Pan-American World Airways, Inc.* 107 F. Supp. 519 (Puerto Rico 1952).

Bugden v. Trawler Cambridge, Inc., 65 N.E.2d 533 (Mass. 1946) is cited as supporting the conclusion that actions for death under the Death on the High Seas Act may be maintained at law. In that case the court said: "The bill of exceptions states that the action is brought under the Jones Act, and under the death on the high seas act. It is settled that actions may be brought in State Courts under the Jones Act. And it has been held that because of the Judiciary Act of 1789, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it," actions to recover damages under the death on the high seas act may be brought in State courts. *Elliott v. Steinfeldt*, 254 App. Div.

⁴⁰See Willock, "Commentary on Maritime Workers," 46 USCA preceding 688 p. 211 (1944) for the history of the Jones Act.

739, 4 N.Y.S.2d 9, *Batkiewicz v. Seas Shipping Co., Inc.* D.C., 53 F.Supp. 802. For the purpose of deciding the single question here presented it is enough if the case is properly before us under either of these acts.' Since the Massachusetts court unquestionably had jurisdiction of the suit under the Jones Act, this decision in no way constitutes an approval of the Elliott or *Batkiewicz* decisions.

Powers v. Cunard S.S. Co. Ltd., 32 F.2d 720 (S.D. N.Y. 1925) and *The Saturnia*, 1936 A.M.C. 469 (S.D. N.Y. 1936) are also referred to as supporting the view that the right of action granted by the Death on the High Seas Act may be enforced in a common-law court. But, in both of these cases the right of action asserted was created by foreign law. The court merely held that Section 4 of the Death on the High Seas Act which states that suit may be maintained in the federal courts of admiralty upon a right of action for death created by a foreign State without abatement in respect to the amount for which recovery is authorized, does not preclude a suit at law on the foreign right of action.⁴¹ This is a very different question than

⁴¹Section 4 of the Death on the High Seas Act provides that: "Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding." Prior to the Death on the High Seas Act, any right of action for death on the high seas granted by foreign law could have been enforced in the state or federal courts of the United States either in suits at law or admiralty, but such suits were subject to the Limitation of Liability Statutes of the United States, 46 USC Sec. 183, et seq., *The Titanic*, 233 U.S. 718 (1914).

whether suit may be brought at law on the federal right of action created by Section 1 of the Act.

This brief resume of the decisions asserted to support the view that the right of action given by the Death on the High Seas Act may be maintained at law demonstrates that only the five decisions in the state courts of New York and three of the federal decisions are holdings to this effect. Of these eight decisions only two are predicated upon independent reasoning of the court. This reasoning, as has been noted, I do not find persuasive. My belief as to the unsoundness of these decisions is strengthened by the decision of Judge Weinfeld in *Iafrate v. Compagnie Generale Transatlantique*, 106 F.Supp. 619 (S.D.N.Y. 1952) in which he reaches the same conclusion. It is noteworthy that Judge Weinfeld is a member of the United States District Court for the Southern District of New York where two of the contrary decisions were rendered.

I hold that the sole right of action for the death of plaintiff's husband is that granted by the Death on

Section 4 of the Death on the High Seas Act provides a procedure by which the foreign right of action may be enforced in admiralty without having the recovery diminished by the Limitation of Liability Statutes. *Powers v. Cunard S. S. Co.* and the *Saturnia* merely held that Section 4 did not preclude the enforcement of a foreign right of action in a suit at law, but apparently the Limitation of Liability Statutes would still apply to such a suit. Other cases have held that if a person asserting a foreign right of action for wrongful death wishes to avoid the Limitation of Liability Statutes by invoking Section 4 of the Death on the High Seas Act, the procedure set forth in that Section must be followed and the suit must be in admiralty. See *The Silverpalm*, 79 F. 2d 598 (9 Cir. 1935); *Egan v. Donaldson Atlantic Line*, 37 F. Supp. 909 (S.D.N.Y. 1941).

the High Seas Act, and that this right must be maintained in admiralty. Since the Superior Court of California had no jurisdiction to entertain the suit at law for the death of plaintiff's husband, this court could not acquire jurisdiction by removal. The action must therefore be dismissed without prejudice to the filing of an action in admiralty by the decedent's personal representative.

Dated : April 15, 1954."

No. 14,592

IN THE

United States Court of Appeals
For the Ninth Circuit

WALLACE HIGA, Administrator of the
Estate of Takeichi Higa,

Appellant,

vs.

TRANSOCEAN AIRLINES, a corporation,

Appellee.

Upon Appeal from the United States District Court
for the District of Hawaii.

APPELLANT'S PETITION FOR A REHEARING.

SHIRO KASHIWA,

307 Hawaiian Trust Building, Honolulu 13, T. H.,

*Attorney for Appellant Wallace
Higa, Administrator of the
Estate of Takeichi Higa, De-
ceased.*

On the Brief:

GENRO KASHIWA.

FILE

JAN -7 1956

PAUL P. O'BRIEN, CH

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No. 14,592

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WALLACE HIGA, Administrator of the
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VS.

TRANSOCEAN AIRLINES, a corporation,

Appellee.

Upon Appeal from the United States District Court
for the District of Hawaii.

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable William Denman, Chief Judge, and
to the Honorable Associate Judges of the United
States Court of Appeals for the Ninth Circuit:*

I.

PRELIMINARY STATEMENT.

Having carefully considered the opinion of this Court, made and entered in this cause on December 15, 1955, we are convinced that this case is one in which a rehearing should be granted to the appellant for reasons to which we will presently refer.

The affirmance by this Court of the judgment of the court below affirms the following: "that the complaint herein be and it hereby is dismissed without prejudice

to the filing of an appropriate suit for damages in admiralty” (tr. 24). The death in this case took place on or about July 11, 1953 (tr. 5) and appellant will be faced with the defense of the two year statute of limitations as provided in the “Death on High Seas” Act. See 46 USCA section 763. The records of this court will show that this case was ready for argument on April 11, 1955 (date of appellee’s brief) and a request for an early argument was made on June 27, 1955 by letter to Mr. Paul P. O’Brien, Clerk of this Court, stating full circumstances. The request was denied. See Exhibits A and B at end of this brief reciting said letters in full.

It is hereby requested that that portion of the last paragraph of the decision of this court be changed, reversing the dismissal by the court below, and mandating that, instead of a dismissal, this cause be transferred to the admiralty docket of the trial court. The authorities in support of this position follow:

**1. TRANSFERS FROM THE CIVIL DOCKET TO THE
ADMIRALTY DOCKET MAY BE MADE.**

It is respectfully submitted that the “substantial rights of an injured person are not to be determined differently whether his case is labeled ‘law side’ or ‘admiralty side’ on a district court’s docket.” *Pope and Talbot, Inc. v. Hawn*, 74 S. Ct. 202, 206, 346 U.S. 406, 411. In the same decision the court pointed out that it will not allow the loss of substantial rights to “depend on which court house or *even on which side of the same court house*, a lawyer might guess to be in the best interest of his client” (emphasis supplied).

In *Prince Line v. American Paper Exports*, 55 F. 2d 1053 at 1056, the court stated:

“When a cause of action is within the substantive jurisdiction of the District Court for any reason, it does not mar that jurisdiction that the suitor proceeds as libellant in the admiralty rather than as plaintiff at law.”

And in *Cory Bros. & Co. v. U. S.*, 51 F.2d 1010, 1013, the court stated as follows:

“But it by no means follows that a suit erroneously assumed to be under the Suits in Admiralty Act cannot be treated as one under the Tucker Act. The mistake results only in formal differences. The pleading has been called libel instead of a petition, and contains allegations of admiralty jurisdiction which are surplusage. So we hold that, if the court did not have jurisdiction in admiralty, jurisdiction existed under the Tucker Act and we pass to a consideration of the merits, namely, whether the libel states facts sufficient to constitute a good cause of action.”

And in *Petrol Corporation v. Petroleum Heat and Power Co.*, 162 F.2d 327, 330, the court also stated:

“We have fully recognized transfers from the admiralty docket to the civil docket.”

See also *James Richardson & Sons v. Connors Marine Co.*, 141 F.2d 226, 229, where it was held:

“For here all the facts showing diversity jurisdiction are presented, and it is well settled that under such circumstances an action shall be treated as within that jurisdiction where appropriate, even though it may have been commenced in admiralty.”

And finally see *The Silverpalm*, 79 F.2d 598, a decision of this court where this court proceeded to hear in admiralty, a cause which was erroneously held to be a law case in the court below.

II.

CONCLUSION.

It is therefore submitted that substantial justice will be carried forth by this court's modification of the last paragraph of its decision ordering the lower court to transfer the cause from the law docket to the admiralty docket. Jury trial is hereby waived by appellant upon said modification. We, therefore, respectfully request that this court grant a rehearing.

Dated, Honolulu, Territory of Hawaii,
January 4, 1956.

Respectfully submitted,

WALLACE HIGA,

*Administrator of the Estate
of Takeichi Higa,
deceased, 'Appellant.*

By SHIRO KASHIWA,
His Attorney.

GENRO KASHIWA,
Of Counsel.

CERTIFICATE OF COUNSEL

I hereby certify that I am of counsel for appellant and petitioner in the above-entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, Honolulu, Territory of Hawaii,
January 4, 1956.

SHIRO KASHIWA,
*Of Counsel for Appellant
and Petitioner.*

(Exhibits "A" and "B" Follow.)

Exhibits.

EXHIBIT "A"

Kashiwa and Kashiwa
Attorneys at Law
Hawaiian Trust Building
Honolulu 13, Hawaii

Shiro Kashiwa
Genro Kashiwa

Phone: 57109
Telegraphic Address:
"Kashlaw Honolulu"
June 27, 1955

Mr. Paul P. O'Brien
Clerk, U. S. Court of Appeals
For the Ninth Circuit
San Francisco 1, California

Re: No. 14592
Higa vs. Transocean

Dear Sir:

I have not heard anything from you regarding argument in the above mentioned case.

The airplane involved in the case fell in the waters off Wake Island on July 11, 1953. It happens that July 11, 1955 will be two years within which we must file an admiralty suit if our appeal is denied. I am wondering whether it would be possible to have argument in the above case set sometime during the early part of July.

Yours very truly,
/s/ SHIRO KASHIWA
Shiro Kashiwa

SK:ao

P.S. Please wire "Kashlaw Honolulu" collect for answer.

EXHIBIT "B"

Office of the Clerk
U. S. Court of Appeals
For the Ninth Circuit
San Francisco 1, Calif.

June 29, 1955

Shiro Kashiwa, Esq.
Attorney at Law
Hawaiian Trust Bldg.
Honolulu 13, Hawaii

Re: No. 14592
Higa vs. Transocean

Dear Mr. Kashiwa:

I have your favor dated the 27th instant, concerning the assignment of the above cause for hearing.

As you know our Court has been somewhat behind in the calendaring of its cases and it is quite likely the above cause will be calendared for hearing sometime during the month of September or October.

I shall advise you of the definite date of hearing later.

Sincerely yours,
/s/ PAUL P. O'BRIEN,
Paul P. O'Brien,
Clerk.

O'B:m

No. 14593

United States
Court of Appeals
for the Ninth Circuit

JOHN WILSON, LEONARD WHITE, PAUL
BOGOVICH and ELIZABETH TINTORRI,
Appellants,
vs.

B. L. KENNEDY, FORD Q. ELVIDGE, HOW-
ARD D. PORTER and RICHARD TAITANO,
Appellees.

Transcript of Record

Appeal from the District Court of Guam,
Territory of Guam

FILED

MAR 10 1955

PAUL P. O'BRIEN,
CLERK

No. 14593

United States
Court of Appeals
for the Ninth Circuit

JOHN WILSON, LEONARD WHITE, PAUL
BOGOVICH and ELIZABETH TINTORRI,
Appellants,

vs.

B. L. KENNEDY, FORD Q. ELVIDGE, HOW-
ARD D. PORTER and RICHARD TAITANO,
Appellees.

Transcript of Record

Appeal from the District Court of Guam,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Island Attorney,

RICHARD ROSENBERRY,

Deputy Island Attorney,

Agana, Guam,

For Appellees.

In the District Court of Guam, Unincorporated
Territory of Guam

Civil Case No. 27-54

JOHN WILSON, LEONARD WHITE and PAUL
BOGOVICH and ELIZABETH TINTORRI,
Plaintiffs,

vs.

B. L. KENNEDY, FORD Q. ELVIDGE, HOW-
ARD D. PORTER and RICHARD TAITANO,
Defendants.

COMPLAINT

Plaintiffs for their claims allege:

I.

The action arises under the provisions of Sections 1421a, 1421b, 1421c(b), 1421h, 1421i, 1422g and 1424 of Title 48 of U.S.C.A., and 1340, 1341, 1343 and 2202, of Title 28 of U.S.C.A.; these claims are joined pursuant to the provisions of the Federal Rules of Civil Procedure. There is a common question of law involved in all claims.

II.

That plaintiffs, all citizens of the United States of America, have been residents of the unincorporated territory of Guam from 1951 to the present time; and have derived their entire income from sources within said unincorporated territory of Guam during said period of time; that no portion

of said income has been earned as an employee of the United States of America or of any agency thereof.

That defendant B. L. Kennedy has, since the year 1953, been holding himself out to be the Commissioner of Revenue and Taxation of the unincorporated territory of Guam, claiming to have been duly appointed to such office pursuant to law with the power and duty to collect a territorial income tax; that defendant Ford Q. Elvidge has, since the year 1953, been the Governor of the unincorporated territory of Guam; that defendant Howard D. Porter has, since the year 1953, been the Attorney General of the unincorporated territory of Guam and that defendant Richard Taitano has, since the year 1952, been the Director of Finance of the unincorporated territory of Guam.

III.

This action is brought on behalf of the plaintiffs, as well as on behalf of each and all other persons similarly situated who are residents of the unincorporated territory of Guam and who have been coerced into paying monies to the defendants herein under the alleged territorial income tax law, or who have been coerced into withholding sums of money from employees and paying the said sums over to defendants under the alleged territorial income tax law and on behalf of all other persons upon whom demands and threats of levy and assessment have been made or to whom threats of coercive action, civil and criminal, have been made, unless they com-

plied with the illegal demands of the defendants herein, and for the recovery of alleged territorial income taxes illegally collected from plaintiffs in the amounts and for the calendar years set forth below.

Plaintiff John Wilson the sum of One Thousand One Hundred Thirty Six and 80/100 Dollars (\$1,136.80) for the calendar year 1952 and the sum of One Thousand Four Hundred Seventy Six and 80/100 Dollars (\$1,476.80) for the calendar year 1953. Plaintiff Leonard White, the sum of One Thousand One Hundred Forty Seven and 90/100 Dollars (\$1,147.90) for the calendar year 1951 and the sum of One Thousand Seven Hundred Twenty Three and 30/100 Dollars (\$1,723.30) for the calendar year 1953.

And as such, collected by the said B. L. Kennedy and his predecessors in office claiming to be Commissioner of Revenue and Taxation of the unincorporated territory of Guam.

IV.

That the defendants and their predecessors in office claim that since the 1st day of August, 1950, there has existed as a territorial statute of the unincorporated territory of Guam, a tax law which is textually the same as the income tax laws of the United States of America, and that these defendants, or some of them, have the right to administer, interpret, enforce and collect the same, and that said alleged territorial income tax was created and enacted by Section 1421f, Title 48, U.S.C.A.

V.

That pursuant to said claims of defendants and their predecessors in office, said defendants have caused to be published numerous notices, claims, and demands, by radio, the public press, public posting of notices, and by letters of instruction and demand sent through the United States mails, asserting the existence of the alleged territorial income tax, their alleged right to enforce said claimed tax, their right to interpret the alleged tax, and have threatened to invoke the application of and use numerous penalties, both criminal and civil, and other coercive measures alleged to be contained therein; and that they have claimed the right of assessment of the alleged tax and of the alleged criminal and civil penalties therein contained, and the right to utilize the coercive measures, including the summary proceedings contained in the United States Internal Revenue Code, and other criminal and civil penalties therein contained.

VI.

That by means of these threats and coercion the defendants have illegally collected the sums hereinabove set out in Paragraph III, and further, have collected vast sums of money from numerous other persons, and have illegally converted the same to the benefit and use of the unincorporated territory of Guam.

VII.

That defendants, by illegal threats to invoke and use criminal and civil penalties and other coercion,

have caused and procured the employers of the plaintiffs John Wilson and Leonard White to withhold various sums of money from their wages and to pay the same over to defendants in violation of the provisions of Section 1621 et sec. of the United States Internal Revenue Code, said sections being illegally claimed by defendants to be incorporated in the alleged territorial income tax laws.

VIII.

That defendants, by illegal threats and coercion have required plaintiffs Paul Bogovich and Elizabeth Tintorri, to withhold and pay over to defendants various sums of money aggregating in excess of Three Thousand Six Hundred Dollars (\$3,600.00) during the period 1951 to 1953, due and owing to employees of said plaintiffs, as salaries and wages, in violation of the provision of Section 1621 et sec. of the United States Internal Revenue Code, which sections defendants illegally claim to be incorporated in the alleged territorial income tax law.

IX.

That said sums referred to in Paragraphs VII and VIII above have been illegally converted by defendants to the uses and benefit of the Government of the unincorporated territory of Guam.

X.

That defendants have illegally threatened to apply the alleged coercive and summary provisions of the Internal Revenue Code of the United States of America against the plaintiffs and any other

person who has resisted or refused to acknowledge their right to levy, assess, interpret, collect and administer the alleged territorial income tax or to file returns and pay the same.

XI.

That defendants have coerced the plaintiffs and others to pay the alleged tax by threats to use the purported enforcement procedures which defendants claimed to be contained in said alleged territorial income tax, and continue to so threaten the plaintiffs and many others.

XII.

That the defendants have unlawfully usurped the duties, responsibilities and authority of the Commissioner of Internal Revenue of the United States; the legislative authority of the Congress of the United States; have unlawfully usurped the authority of the United States Courts; in that defendants illegally claim and exercise the right and authority to substitute words, clauses, phrases and sentences; to interlineate words, clauses, phrases and sentences, and to delete or amend any or all portions of the Internal Revenue Code of the United States claimed by them to have been incorporated into the statutes of the unincorporated territory of Guam by the provisions of Section 1421f, Title 48, U.S.C.A.

XIII.

That no statute of the United States authorizes

any of the defendants to exercise the powers so claimed or grants the authority being illegally exercised by the defendants.

XIV.

That no statute of the unincorporated territory of Guam authorizes the imposition, assessment, collection or enforcement of an alleged territorial income tax.

XV.

That no statute of the unincorporated territory of Guam creates the office of Commissioner of Internal Revenue or any other office with the authority and duty to levy, assess, collect, interpret or administer an alleged territorial income tax.

XVI.

That no statute of the United States of America, or the unincorporated territory of Guam, provides for relief or any appellate procedure in instances where under the alleged territorial income tax the taxpayer seeks relief from excessive, illegal, arbitrary or void imposition of tax.

XVII.

That no statute of the United States of America authorizes appeals under the alleged territorial income tax either to the Tax Court of the United States or to the Court of Claims of the United States, and no statute of the unincorporated territory of Guam provides any similar means of seeking or obtaining judicial relief as provided for by

the statutes of the United States for taxpayers claiming a right to relief under the alleged territorial income tax.

XVIII.

That no statute of the unincorporated territory of Guam provides for repayment of any income tax illegally collected or provides any means for its recovery.

XIX.

That no statute of the unincorporated territory of Guam permits bringing suit against officials of the unincorporated territory of Guam in their official capacity with respect to the alleged territorial income tax.

XX.

That the alleged territorial income tax of Guam and the illegal means by which it is being attempted to be collected, deprives and attempts to deprive plaintiffs and many others of their property without due process of law, in violation of statutes of the United States and Section 1421g, Title 48, U.S.C.A.

XXI.

That by reason of the facts set forth in the complaint, there is now due and owing from the defendants to Plaintiff John Wilson the sum of Two Thousand Six Hundred Thirteen and 60/100 Dollars (\$2,613.60) and to Plaintiff Leonard White the sum of Two Thousand Eight Hundred Seventy One and 20/100 Dollars (\$2,871.20), which sums were

unlawfully levied, assessed and collected and no part of said sums have been repaid to plaintiffs.

XXII.

That unless the defendants are restrained and enjoined from pursuing their illegal acts as hereinbefore set forth they will, as the plaintiffs believe and so allege, continue to attempt to compel the plaintiffs to comply with the claimed provisions of the alleged territorial income tax, and the plaintiffs and numerous other persons will be forced to submit to the confiscation of their property and monies without due process of law and in violation of their rights under the laws of the United States as hereinbefore alleged, and will be subjected to great and irreparable loss and damage.

Wherefore, plaintiffs demand:

Judgment against the defendants jointly and severally for the following sums, together with interest. Plaintiff John Wilson, the sum of Two Thousand Six Hundred Thirteen and 60/100 Dollars (\$2,613.60); Plaintiff Leonard White, the sum of Two Thousand Eight Hundred Seventy One and 20/100 Dollars (\$2,871.20).

That such sums as were illegally collected by Plaintiffs Paul Bogovich and Elizabeth Tintorri under the instruction and orders of defendants or their predecessors in office and pursuant to such orders, paid over to the defendants, be refunded to the persons lawfully entitled to such sums and that defendants be required to give Plaintiffs Paul Bog-

ovich and Elizabeth Tintorri a proper receipt and release therefor.

That defendants be enjoined and restrained from further illegal levys, assessment and collection, contrary to law, of an illegal territorial income tax.

That a declaratory judgment be entered that

1. There is no territorial income tax for the unincorporated territory of Guam created by Section 1421a, Title 48, U.S.C.A., or at all.

2. That there is no officer of the unincorporated territory of Guam authorized to levy, assess or collect a territorial income tax.

3. That the Internal Revenue Code of the United States of America has not been incorporated in the codes of law of the unincorporated territory of Guam, and does not constitute a part of the tax laws of Guam.

4. That no officer of the unincorporated territory of Guam has the right or duty to interpret, alter or amend the Internal Revenue Code of the United States of America.

5. That the acts of the defendants deny to plaintiffs the right to due process of law and constitute the unlawful taking of property of the plaintiffs in violation of Section 1421a, Title 48, U.S.C.A.

6. That in the statutes of the unincorporated territory of Guam the plaintiffs have no adequate remedy at law.

For costs of suit and for such other and further relief as to the court may be deemed proper.

Dated at Agana, Guam, this 30th day of April, 1954.

/s/ FINTON J. PHELAN, JR.,

Attorney for Plaintiffs.

/s/ E. R. CRAIN,

Attorney for Plaintiffs.

[Endorsed]: Filed April 30, 1954.

[Title of District Court and Cause.]

ORDER GRANTING EXTENSION OF TIME

On Motion of B. L. Kennedy, Howard D. Porter and Richard Taitano, defendants, and the stipulation of the parties showing good cause, leave is hereby given defendants to serve and file their answers or preliminary pleadings as they may desire to the complaint up to and including the 10th day of June, 1954.

Dated this 14th day of May, 1954.

/s/ PAUL D. SHRIVER,

Judge, District Court of Guam

[Endorsed]: Filed May 14, 1954.

[Title of District Court and Cause.]

MOTION

The defendants, B. L. Kennedy, Ford Q. Elvidge, Howard D. Porter and Richard Taitano move the court as follows:

1. To dismiss the action because the complaint fails to state a claim against the defendants upon which relief can be granted.

2. To enter summary judgment for the defendants on the ground that the complaint and affidavits attached herewith show that the defendants are entitled to judgment as a matter of law.

3. To dismiss the action because the court does not have jurisdiction over the subject matter.

Dated this 9th day of June, 1954.

/s/ HOWARD D. PORTER,
Attorney General,

/s/ LEON D. FLORES,
Island Attorney,

/s/ LOUIS A. OTTO, JR.,
Deputy Island Attorney,

/s/ RICHARD ROSENBERRY,
Deputy Island Attorney,
Attorneys for Defendant

[Endorsed]: Filed June 9, 1954.

[Title of District Court and Cause.]

AFFIDAVIT OF FORD Q. ELVIDGE

Territory of Guam,
Agana, Guam—ss.

Defendant Ford Q. Elvidge, being duly sworn,
deposes as follows:

1. That he is the duly appointed Governor of Guam, having assumed office on March 27, 1953.

2. That the Department of Finance, under the Director of Finance, has the function of assessing and collecting all taxes, including the territorial income tax enacted by Section 31 of the Organic Act of Guam, 48 U.S.C.A. 1421i.

3. That the Director of Finance, as head of the Department of Finance within the Executive Branch of the government of Guam, is responsible for and has the supervision of the administration and enforcement of all tax laws and the assessment and collection of all taxes, including the territorial income tax enacted by Section 31 of the Organic Act of Guam, 48 U.S.C.A. 1421i.

4. That the Defendant, Richard Taitano, on the date that this affiant assumed office of Governor of Guam was Director of Finance of the government of Guam and that from that date to the present date has continuously been Director of Finance as aforesaid and that as such Director of Finance has

performed the duties of such office as hereinabove stated.

/s/ FORD Q. ELVIDGE

Subscribed and sworn to before me this 9th day of June, 1954.

[Seal] /s/ [Illegible]

Notary Public for the Territory
of Guam

[Endorsed]: Filed June 9, 1954.

[Title of District Court and Cause.]

AFFIDAVIT OF RICHARD TAITANO

Territory of Guam,
Agana, Guam—ss.

Defendant Richard Taitano, being duly sworn, states as follows:

1. That he has been the duly appointed Director of the Department of Finance since May 1952, and that as such he has had and continues to have the responsibility for and supervision of the assessment and collection of all taxes, including the territorial income tax as provided in Section 31 of the Organic Act of Guam, Section 1421i, Title 48 U.S.C.A.

2. That the functions of assessing and collecting such territorial income tax have since May 1952, been in the Department of Finance under the supervision and direction of the Director thereof as part

of the general function of such Department to enforce the revenue and tax laws, and to the best of this affiant's information and belief these functions have been assigned to and performed by the Director of the Department of Finance since the effective date of Section 31 of the Organic Act of Guam.

3. That B. L. Kennedy was duly appointed by this affiant to the office of Commissioner of Revenue and Taxation of the Government of Guam; which office is an intregal part of the Department of Finance of the Government of Guam, and that the primary duty assigned and delegated unto the Commissioner of Revenue and Taxation has been and is the enforcement and administration of the territorial income tax under Section 31 of the Organic Act of Guam.

/s/ RICHARD F. TAITANO

Subscribed and sworn to before me this 9th day of June, 1954.

[Seal] /s/ [Illegible]

Notary Public for the Territory
of Guam

[Endorsed]: Filed June 9, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION

To: Finton J. Phelan, Jr., and E. R. Crain, Attorneys for Plaintiffs.

Please take notice that the foregoing Motion will be brought on for hearing before the Honorable Paul D. Shriver, Judge of the above entitled Court in his Courtroom in the Guam Congress Building on Friday, the 30th day of July, 1954, at 9:30 a.m., or as soon thereafter as counsel can be heard.

Dated this 9th day of June, 1954.

/s/ HOWARD D. PORTER,
Attorney General

/s/ LEON D. FLORES,
Island Attorney

/s/ LOUIS A. OTTO, JR.,
Deputy Island Attorney

/s/ RICHARD ROSENBERRY,
Deputy Island Attorney
Attorneys for the Defendants

[Endorsed]: Filed June 10, 1954.

[Title of District Court and Cause.]

REQUEST FOR ADMISSION OF FACTS

To: Howard D. Porter, Louis A. Otto, Richard Rosenberry and Leon D. Flores, Attorneys for Defendants, Office of the Attorney General, Government of Guam, Agana, Unincorporated Territory of Guam.

Please take notice that the plaintiffs hereby request the defendant B. L. Kennedy, pursuant to Rule 36 of the Federal Rules of Civil Procedure, to admit, within ten (10) days after service of this request for the purpose of the above entitled action only and subject to all pertinent objections to admissibility which may be interposed at the trial, the truth of the facts as contained in Exhibit A hereto attached and by reference herein incorporated.

Dated this 19th day of July, 1954.

/s/ FINTON J. PHELAN, JR.,

Attorney for Plaintiffs

E. R. CRAIN,

Attorney for Plaintiffs

EXHIBIT "A"

1. That the defendants claim that there exists an income tax within the unincorporated territory of Guam, the text of which is identical with the text of the United States income tax laws, as contained in Title 26, USCA.

2. That the entire text of the United States in-

Exhibit "A"—(Continued)

come tax laws as amended is to be found in Title 26, USCA.

3. That nowhere in the published and promulgated codes of the unincorporated territory of Guam is found the text of the income tax law claimed by defendants to exist.

4. That the Government of Guam has never published or promulgated the text of the income tax law claimed by defendants to exist.

5. That the legislature of the unincorporated territory of Guam has not enacted any statute with respect to the income tax law claimed by defendants to exist.

6. That the legislature of the unincorporated territory of Guam has not enacted any enabling legislation providing for the assessment, levy and collection of the income tax claimed by defendants to exist.

7. That the Government of Guam has not published or promulgated any regulations with respect to the territorial income tax claimed by defendants to exist.

8. That the United States Congress has not enacted any legislation authorizing the defendants or any other officers of the Government of Guam to collect the territorial income tax alleged by defendants to exist.

9. That the entire text of the United States income tax law and the collection procedures therein contained is to be found in sub-title A of Title 26, USCA and is comprised in the sections numbered

Exhibit "A"—(Continued)

as follows: 1-4, 11, 12, 13, 15, 21, 22, 23-28, 31, 32, 35, 41-48, 51-63, 101-131, 141-150, 153, 154, 161-172, 181-184, 186-191, 201-207, 211-221, 231-236, 238, 251, 252, 261, 262, 263, 271-277, 291-298, 311, 312, 321, 322, 331-340, 361, 362, 371-373, 391, 392, 394, 395, 396, 400-404, 421-424, 430-459, 461-465, 470, 471, 472, 474, 480-482, 500-504, 506-508, 700-705, 1100-1106, 1110, 1111-1121, 1130-1133, 1140-1146.

10. (a) That Chapter VI, Title 26, USCA is not a part of the income tax law of the United States.

(b) That Chapter VII, Title 26, USCA, is not a part of the income tax law of the United States.

(c) That Chapter VIII, Title 26, USCA is not a part of the income tax law of the United States.

(d) That Chapter IX, Title 26, USCA is not a part of the income tax law of the United States.

(e) That Chapter IX A, Title 26, USCA is not a part of the income tax law of the United States.

(f) That Chapter X, Title 26, USCA is not a part of the income tax law of the United States.

(g) That Chapter XI, Title 26, USCA is not a part of the income tax law of the United States.

(h) That Chapter XII, Title 26, USCA is not a part of the income tax law of the United States.

(i) That Chapter XIII, Title 26, USCA is not a part of the income tax law of the United States.

(j) That Chapter XIV, Title 26, USCA is not a part of the income tax law of the United States.

(k) That Chapter XV, Title 26, USCA is not a part of the income tax law of the United States.

Exhibit "A"—(Continued)

(l) That Chapter XVI, Title 26, USCA is not a part of the income tax law of the United States.

(m) That Chapter XVII, Title 26, USCA is not a part of the income tax law of the United States.

(n) That Chapter XVIII, Title 26, USCA is not a part of the income tax law of the United States.

(o) That Chapter XIX, Title 26, USCA is not a part of the income tax law of the United States.

(p) That Chapter XX, Title 26, USCA is not a part of the income tax law of the United States.

(q) That Chapter XXI, Title 26, USCA is not a part of the income tax law of the United States.

(r) That Chapter XXII, Title 26, USCA is not a part of the income tax law of the United States.

(s) That Chapter XXIII, Title 26, USCA is not a part of the income tax law of the United States.

(t) That Chapter XXIV, Title 26, USCA is not a part of the income tax law of the United States.

(u) That Chapter XXV, Title 26, USCA is not a part of the income tax law of the United States.

(v) That Chapter XXVI, Title 26, USCA is not a part of the income tax law of the United States.

(w) That Chapter XXVII, Title 26, USCA is not a part of the income tax law of the United States.

(x) That Chapter XXVIII, Title 26, USCA is not a part of the income tax law of the United States.

(y) That Chapter XXIX, Title 26, USCA is not a part of the income tax law of the United States.

(z) That Chapter XXX, Title 26, USCA is not a part of the income tax law of the United States.

(aa) That Chapter XXXI, Title 26, USCA is not

Exhibit "A"—(Continued)

a part of the income tax law of the United States.

(bb) That Chapter XXXII, Title 26, USCA is not a part of the income tax law of the United States.

(cc) That Chapter XXXIII A, Title 26, USCA is not a part of the income tax law of the United States.

11. That the Congress of the United States has not enacted any legislation authorizing defendants to jointly

(a) Construe the income tax laws of the United States.

(b) Interpret the income tax laws of the United States.

(c) Make any additions to the text of the income tax laws of the United States.

(d) Make any deletions from the income tax laws of the United States.

(e) Make any substitution of words or phrases in the income tax laws of the United States.

(f) Enforce the income tax laws of the United States.

(g) Collect the income tax of the United States.

(h) Levy the income tax of the United States.

(i) Assess the income tax of the United States.

(j) Apply, with respect to the collection of the alleged territorial income tax, any remedies or coercive measures contained in Title 26, USCA.

(k) Apply, with respect to the collection of the alleged territorial income tax, any civil penalties contained in Title 26, USCA.

Exhibit "A"—(Continued)

(l) Apply, with respect to the collection of the alleged territorial income tax, any criminal penalties contained in Title 26, USCA.

12. That the Congress of the United States has not enacted any legislation authorizing defendants collectively to

(a) Construe the income tax laws of the United States.

(b) Interpret the income tax laws of the United States.

(c) Make any additions to the text of the income tax laws of the United States.

(d) Make any deletions from the income tax laws of the United States.

(e) Make any substitution of words or phrases in the income tax laws of the United States.

(f) Enforce the income tax laws of the United States.

(g) Collect the income tax of the United States.

(h) Levy the income tax of the United States.

(i) Assess the income tax of the United States.

(j) Apply, with respect to the collection of the alleged territorial income tax, any remedies or coercive measures contained in Title 26, USCA.

(k) Apply, with respect to the collection of the alleged territorial income tax, any civil penalties contained in Title 26, USCA.

(l) Apply, with respect to the collection of the alleged territorial income tax, any criminal penalties contained in Title 26, USCA.

13. That the Congress of the United States has

Exhibit "A"—(Continued)

not enacted any legislation authorizing defendant B. L. Kennedy to

(a) Construe the income tax laws of the United States.

(b) Interpret the income tax laws of the United States.

(c) Make any additions to the text of the income tax laws of the United States.

(d) Make any deletions from the income tax laws of the United States.

(e) Make any substitution of words or phrases in the income tax laws of the United States.

(f) Enforce the income tax laws of the United States.

(g) Collect the income tax of the United States.

(h) Levy the income tax of the United States.

(i) Assess the income tax of the United States.

(j) Apply, with respect to the collection of the alleged territorial income tax, any remedies or coercive measures contained in Title 26, USCA.

(k) Apply, with respect to the collection of the alleged territorial income tax, any civil penalties contained in Title 26, USCA.

(l) Apply, with respect to the collection of the alleged territorial income tax, any criminal penalties contained in Title 26, USCA.

14. That the Congress of the United States has not enacted any legislation authorizing defendant Ford Q. Elvidge to

(a) Construe the income tax laws of the United States.

Exhibit "A"—(Continued)

(b) Interpret the income tax laws of the United States.

(c) Make any additions to the text of the income tax laws of the United States.

(d) Make any deletions from the income tax laws of the United States.

(e) Make any substitution of words or phrases in the income tax laws of the United States.

(f) Enforce the income tax laws of the United States.

(g) Collect the income tax of the United States.

(h) Levy the income tax of the United States.

(i) Assess the income tax of the United States.

(j) Apply, with respect to the collection of the alleged territorial income tax, any remedies or coercive measures contained in Title 26, USCA.

(k) Apply, with respect to the collection of the alleged territorial income tax, any civil penalties contained in Title 26, USCA.

(l) Apply, with respect to the collection of the alleged territorial income tax, any criminal penalties contained in Title 26, USCA.

15. That the Congress of the United States has not enacted any legislation authorizing defendant Richard Taitano to

(a) Construe the income tax laws of the United States.

(b) Interpret the income tax laws of the United States.

(c) Make any additions to the text of the income tax laws of the United States.

Exhibit "A"—(Continued)

(d) Make any deletions from the income tax laws of the United States.

(e) Make any substitution of words or phrases in the income tax laws of the United States.

(f) Enforce the income tax laws of the United States.

(g) Collect the income tax of the United States.

(h) Levy the income tax of the United States.

(i) Assess the income tax of the United States.

(j) Apply, with respect to the collection of the alleged territorial income tax, any remedies or coercive measures contained in Title 26, USCA.

(k) Apply, with respect to the collection of the alleged territorial income tax, any civil penalties contained in Title 26, USCA.

(l) Apply, with respect to the collection of the alleged territorial income tax, any criminal penalties contained in Title 26, USCA.

16. That the Congress of the United States has not enacted any legislation authorizing defendant Howard D. Porter to

(a) Construe the income tax laws of the United States.

(b) Interpret the income tax laws of the United States.

(c) Make any additions to the text of the income tax laws of the United States.

(d) Make any deletions from the income tax laws of the United States.

(e) Make any substitution of words or phrases in the income tax laws of the United States.

Exhibit "A"—(Continued)

(f) Enforce the income tax laws of the United States.

(g) Collect the income tax of the United States.

(h) Levy the income tax of the United States.

(i) Assess the income tax of the United States.

(j) Apply, with respect to the collection of the alleged territorial income tax, any remedies or coercive measures contained in Title 26, USCA.

(k) Apply, with respect to the collection of the alleged territorial income tax, any civil penalties contained in Title 26, USCA.

(l) Apply, with respect to the collection of the alleged territorial income tax, any criminal penalties contained in Title 26, USCA.

17. That no statute of the United States of America can be cited containing any grant of authority or delegation of power to the defendants jointly to

(a) Construe the income tax laws of the United States.

(b) Interpret the income tax laws of the United States.

(c) Make any additions to the text of the income tax laws of the United States.

(d) Make any deletions from the income tax laws of the United States.

(e) Make any substitution of words or phrases in the income tax laws of the United States.

(f) Enforce the income tax laws of the United States.

(g) Collect the income tax of the United States.

Exhibit "A"—(Continued)

(h) Levy the income tax of the United States.

(i) Assess the income tax of the United States.

(j) Apply, with respect to the collection of the alleged territorial income tax, any remedies or coercive measures contained in Title 26, USCA.

(k) Apply, with respect to the collection of the alleged territorial income tax, any civil penalties contained in Title 26, USCA.

(l) Apply, with respect to the collection of the alleged territorial income tax, any criminal penalties contained in Title 26, USCA.

18. That no statute of the United States of America can be cited containing any grant of authority or delegation of power to the defendants collectively to

(a) Construe the income tax laws of the United States.

(b) Interpret the income tax laws of the United States.

(c) Make any additions to the text of the income tax laws of the United States.

(d) Make any deletions from the income tax laws of the United States.

(e) Make any substitution of words or phrases in the income tax laws of the United States.

(f) Enforce the income tax laws of the United States.

(g) Collect the income tax of the United States.

(h) Levy the income tax of the United States.

(i) Assess the income tax of the United States.

(j) Apply, with respect to the collection of the

Exhibit "A"—(Continued)

alleged territorial income tax, any remedies or coercive measures contained in Title 26, USCA.

(k) Apply, with respect to the collection of the alleged territorial income tax, any civil penalties contained in Title 26, USCA.

(l) Apply, with respect to the collection of the alleged territorial income tax, any criminal penalties contained in Title 26, USCA.

19. That no statute of the United States of America can be cited containing any grant of authority or delegation of power to the defendant B. L. Kennedy to

(a) Construe the income tax laws of the United States.

(b) Interpret the income tax laws of the United States.

(c) Make any additions to the text of the income tax laws of the United States.

(d) Make any deletions from the income tax laws of the United States.

e. Make any substitution of words or phrases in the income tax laws of the United States.

(f) Enforce the income tax laws of the United States.

(g) Collect the income tax of the United States.

(h) Levy the income tax of the United States.

(i) Assess the income tax of the United States.

(j) Apply, with respect to the collection of the alleged territorial income tax, any remedies and coercive measures contained in Title 26 USCA.

(k) Apply, with respect to the collection of the

Exhibit "A"—(Continued)

alleged territorial income tax, any civil penalties contained in Title 26, USCA.

(l) Apply, with respect to the collection of the alleged territorial income tax, any criminal penalties contained in Title 26, USCA.

20. That no statute of the United States of America can be cited containing any grant of authority or delegation of power to the defendant Ford Q. Elvidge to

(a) Construe the income tax laws of the United States.

(b) Interpret the income tax laws of the United States.

(c) Make any additions to the text of the income tax laws of the United States.

(d) Make any deletions from the income tax laws of the United States.

(e) Make any substitution of words or phrases in the income tax laws of the United States.

(f) Enforce the income tax laws of the United States.

(g) Collect the income tax of the United States.

(h) Levy the income tax of the United States.

(i) Assess the income tax of the United States.

(j) Apply, with respect to the collection of the alleged territorial income tax, any remedies and coercive measures contained in Title 26, USCA.

(k) Apply, with respect to the collection of the alleged territorial income tax, any civil penalties contained in Title 26, USCA.

(l) Apply, with respect to the collection of the

Exhibit "A"—(Continued)

alleged territorial income tax, any criminal penalties contained in Title 26, USCA.

21. That no statute of the United States of America can be cited containing any grant of authority or delegation of power to the defendant Richard Taitano to

(a) Construe the income tax laws of the United States.

(b) Interpret the income tax laws of the United States.

(c) Make any additions to the text of the income tax laws of the United States.

(d) Make any deletions from the income tax laws of the United States.

(e) Make any substitution of words or phrases in the income tax laws of the United States.

(f) Enforce the income tax laws of the United States.

(g) Collect the income tax of the United States.

(h) Levy the income tax of the United States.

(i) Assess the income tax of the United States.

(j) Apply, with respect to the collection of the alleged territorial income tax, any remedies and coercive measures contained in Title 26, USCA.

(k) Apply, with respect to the collection of the alleged territorial income tax, any civil penalties contained in Title 26, USCA.

(l) Apply, with respect to the collection of the alleged territorial income tax, any criminal penalties contained in Title 26, USCA.

22. That no statute of the United States of

Exhibit "A"—(Continued)

America can be cited containing any grant of authority or delegation of power to the defendant Howard D. Porter, to

(a) Construe the income tax laws of the United States.

(b) Interpret the income tax laws of the United States.

(c) Make any additions to the text of the income tax laws of the United States.

(d) Make any deletions from the income tax laws of the United States.

(e) Make any substitution of words or phrases in the income tax laws of the United States.

(f) Enforce the income tax laws of the United States.

(g) Collect the income tax of the United States.

(h) Levy the income tax of the United States.

(i) Assess the income tax of the United States.

(j) Apply, with respect to the collection of the alleged territorial income tax any remedies and coercive measures contained in Title 26, USCA.

(k) Apply, with respect to the collection of the alleged territorial income tax, any civil penalties contained in Title 26, USCA.

(l) Apply, with respect to the collection of the alleged territorial income tax, any criminal penalties contained in Title 26, USCA.

23. That the defendants and and other agents of the Department of Finance of the Government of Guam have

Exhibit "A"—(Continued)

(a) Demanded payment from numerous persons of a territorial income tax.

(b) Published notices in the newspapers within the unincorporated territory of Guam directing various persons to pay a territorial income tax.

(c) Issued forms and letters of instruction to numerous persons on Guam with respect to the collection and payment of a territorial income tax.

(d) Informed numerous citizens of their obligations claimed to exist under a claimed territorial income tax.

(e) Written letters of demand to numerous citizens demanding payment to the defendants Kennedy and Taitano, or their agents, of sums claimed to be due under a claimed territorial income tax.

(f) Exercised the right to assess a claimed territorial income tax.

(g) Publicly claimed the existence of civil penalties with respect to the enforcement of the claimed territorial income tax.

(h) Publicly claimed the existence of criminal penalties with respect to the enforcement of the claimed territorial income tax.

24. That the defendant Taitano has personally or through his agents and servants, accepted payment from various citizens of sums of money, pursuant to the said claimed territorial income tax.

25. That the defendant Kennedy has personally or through his agents and servants, accepted payment from various citizens of sums of money pursuant to the said claimed territorial income tax.

Exhibit "A"—(Continued)

26. That the defendant, B. L. Kennedy, personally and through his agents, has interpreted the claimed territorial income tax by

(a) Deleting words from the text of the United States income tax law as found in Title 26, USCA.

(d) Deleting clauses and phrases from the text of the United States income tax law as found in Title 26, USCA.

(c) Adding words to the text of the United States income tax law as found in Title 26, USCA.

(d) Adding clauses and phrases to the text of the United States income tax law as found in Title 26, USCA.

(e) Substituting words in the text of the United States income tax law as found in Title 26, USCA.

(f) Substituting clauses and phrases in the text of the United States income tax law as found in Title 26, USCA.

(g) Published interpretations of the meaning and effect of the United States income tax law as found in Title 26, USCA.

27. That the defendant, Ford Q. Elvidge, personally and through his agents, has interpreted the claimed territorial income tax by

(a) Deleting words from the text of the United States income tax law as found in Title 26, USCA.

(b) Deleting clauses and phrases from the text of the United States income tax law as found in Title 26, USCA.

Exhibit "A"—(Continued)

(c) Adding words to the text of the United States income tax law as found in Title 26, USCA.

(d) Adding clauses and phrases to the text of the United States income tax law as found in Title 26, USCA.

(e) Substituting words in the text of the United States income tax law as found in Title 26, USCA.

(f) Substituting clauses and phrases in the text of the United States income tax law as found in Title 26, USCA.

(g) Publishing interpretations of the United States income tax law as found in Title 26, USCA.

28. That the defendant, Richard Taitano, personally and through his agents, has interpreted the claimed territorial income tax by

(a) Deleting words from the text of the United States income tax law as found in Title 26, USCA.

(b) Deleting clauses and phrases from the text of the United States income tax law as found in Title 26, USCA.

(c) Adding words to the text of the United States income tax law as found in Title 26, USCA.

(d) Adding clauses and phrases to the text of the United States income tax law as found in Title 26, USCA.

(e) Substituting words in the text of the United States income tax law as found in Title 26, USCA.

(f) Substituting clauses and phrases in the text of the United States income tax law as found in Title 26, USCA.

(g) Publishing interpretations of the United

Exhibit "A"—(Continued)

States income tax law as found in Title 26, USCA.

29. That the defendant, Howard D. Porter, personally and through his agents, has interpreted the claimed territorial income tax by

(a) Deleting words from the text of the United States income tax law as found in Title 26, USCA.

(b) Deleting clauses and phrases from the text of the United States income tax law as found in Title 26, USCA.

(c) Adding words to the text of the United States income tax law as found in Title 26, USCA.

(d) Adding clauses and phrases to the text of the United States income tax law as found in Title 26, USCA.

(e) Substituting words in the text of the United States income tax law as found in Title 26, USCA.

(f) Substituting clauses and phrases in the text of the United States income tax law as found in Title 26, USCA.

(g) Publishing interpretations of the United States income tax law as found in Title 26, USCA.

30. That no statute of the United States has enlarged the jurisdiction of the Tax Court of the United States to include any matters arising under the territorial tax law claimed to exist within the unincorporated territory of Guam.

31. That no statute of the unincorporated territory of Guam has created a court with similar jurisdiction to that of the Tax Court of the United States.

32. That no statute of the unincorporated terri-

Exhibit "A"—(Continued)

tory of Guam provides for suits to recover income taxes

(a) Illegally collected under a territorial income tax law.

(b) Erroneously collected under a territorial income tax law.

(c) Overpaid under a territorial income tax law.

33. That Chapter 34 of Title 26, USCA

(a) Is part of the United States Internal Revenue Code.

(b) Is not within the income tax sections of the United States Internal Revenue Code.

(c) Has not been extended to the unincorporated territory of Guam by any act of the United States Congress.

(d) Has not been extended to the unincorporated territory of Guam by any act of the Guam Legislature.

34. That Section 3640, Title 26, USCA has not been amended by any act of the United States Congress and refers solely to the Commissioner of Internal Revenue of the United States of America.

35. That Section 3647, Title 26, USCA specifically restricts delegation of authority, duties or functions of the Commissioner of Internal Revenue to officers or employees of the United States Bureau of Internal Revenue, and then only pursuant to such regulations as may be approved by the Secretary of the Treasury.

36. That Section 3650, Title 26, USCA provides for the establishment by the President, of Collec-

Exhibit "A"—(Continued)

tion Districts for the collection of all internal revenue taxes of the United States.

37. That Section 3650 B of Title 26, USCA restricts the total number of Collection Districts to not to exceed 65.

38. That Section 3653 of Title 26, USCA applies solely to United States internal revenue taxes.

39. That sub-chapter A of Chapter 36, Title 26, USCA refers specifically to internal revenue taxes of the United States and their collection.

40. That sub-chapter B of Chapter 36, Title 26, USCA refers specifically to internal revenue taxes of the United States and their collection.

41. That sub-chapter C of Chapter 36, Title 26, USCA refers specifically to internal revenue taxes of the United States and their collection.

42. That sub-chapter D of Chapter 36, Title 26, USCA refers specifically to internal revenue taxes of the United States and their collection.

43. That sub-chapter E of Chapter 36, Title 26, USCA refers specifically to internal revenue taxes of the United States and their collection.

44. That the defendant, B. L. Kennedy, while an officer of the unincorporated territory of Guam, was not an officer or employee of the United States Bureau of Internal Revenue or of the United States Treasury Department.

45. (a) That the defendant, Ford Q. Elvidge, is not an officer or employee of the United States Bureau of Internal Revenue or of the United States Treasury Department.

Exhibit "A"—(Continued)

(b) That the defendant, Howard D. Porter, is not an officer or employee of the United States Bureau of Internal Revenue or of the United States Treasury Department.

(c) That the defendant, Richard Taitano, is not an officer or employee of the United States Bureau of Internal Revenue or of the United States Treasury Department.

46. That the Secretary of the Treasury of the United States has not delegated any duty or authority provided for by the United States statutes with respect to internal revenue to (a) B. L. Kennedy, (b) Ford Q. Elvidge, (c) Richard Taitano, (d) Howard D. Porter, (e) any officer of the unincorporated territory of Guam.

47. That the Commissioner of Internal Revenue of the United States has not delegated any duty or authority provided for by the United States statutes with respect to internal revenue to (a) B. L. Kennedy, (b) Ford Q. Elvidge, (c) Richard Taitano, (d) Howard D. Porter, (e) any officer of the unincorporated territory of Guam.

48. That the President of the United States has not delegated any duty or authority provided for by United States statutes with respect to internal revenue to (a) B. L. Kennedy, (b) Ford Q. Elvidge, (c) Richard Taitano, (d) Howard D. Porter (e) any officer of the unincorporated territory of Guam.

49. That Section 3770 Title 26, USCA does not confer any authority on defendant B. L. Kennedy

Exhibit "A"—(Continued)

or any employee or agent of the Government of Guam.

50. That Section 3770, Title 26, USCA does not confer any authority on defendant Ford Q. Elvidge or any employee or agent of the Government of Guam.

51. That Section 3770, Title 26, USCA does not confer any authority on defendant Richard Taitano or any employee or agent of the Government of Guam.

52. That Section 3770, Title 26, USCA does not confer any authority on defendant Howard D. Porter or any employee or agent of the Government of Guam.

53. That no statute of the United States has made Section 3770, Title 26, USCA applicable to any person but the Commissioner of Internal Revenue of the United States.

54. That Section 3772, Title 26, USCA refers solely to (a) taxes of the United States (b) the Commissioner of Internal Revenue of the United States.

55. That Section 3777, Title 26, USCA, makes mandatory the reporting by the Commissioner of Internal Revenue of the United States to the Joint Committee on Internal Revenue Taxation of the United States and prohibits refund or credit until 30 days after such report of the facts and the decision of the Commissioner.

56. That Section 3791 of Title 26, USCA, authorizes the Commissioner of Internal Revenue, with

Exhibit "A"—(Continued)

the approval of the Secretary of the Treasury, to make rules and regulations with respect to the Internal Revenue Code of the Code of the United States.

57. That the Commissioner of Internal Revenue of the United States and the Secretary of the Treasury of the United States have not delegated any part of this authority to B. L. Kennedy.

58. That the Commissioner of Internal Revenue of the United States and the Secretary of the Treasury of the United States have not delegated any part of this authority to Ford Q. Elvidge.

59. That the Commissioner of Internal Revenue of the United States and the Secretary of the Treasury of the United States have not delegated any part of this authority to Richard Taitano.

60. That the Commissioner of Internal Revenue of the United States and the Secretary of the Treasury of the United States have not delegated any part of this authority to Howard D. Porter.

61. That the Commissioner of Internal Revenue of the United States is not authorized to delegate any part of this authority to any of the defendants.

62. That the Secretary of the Treasury of the United States is not authorized to delegate any part of this authority to any of the defendants.

63. (a) That section 3797, Title 26, USCA defines the term "United States" when used in a geographical sense to include only the states, the territories of Hawaii and Alaska and the District of Columbia.

(b) That Section 3797, Title 26, USCA defines

Exhibit "A"—(Continued)

the term "state" to include the territories of Alaska and Hawaii and the District of Columbia where such construction is necessary.

(c) That Section 3797, Title 26, USCA defines the term "Secretary" as the Secretary of the Treasury of the United States.

(d) That Section 3797, Title 26, USCA defines the term "Commissioner" to mean the Commissioner of Internal Revenue of the United States.

64. That no statute of the United States has amended the definitions contained in 63 (a) (b) (c) and (d) above.

65. That no statute of the unincorporated territory of Guam has amended the definitions contained in 63 (a) (b) (c) and (d) above.

66. That Section 3900, Title 26, USCA, provides that the Commissioner of Internal Revenue shall (a) be in the Department of the Treasury, (b) be appointed by the President of the United States, (c) be confirmed by the Senate of the United States.

67. That the defendant Taitano (a) is not an officer of the United States Treasury Department, (b) has not been appointed by the President of the United States, (c) has not been confirmed by the Senate of the United States.

68. That the defendant Kennedy (a) is not an officer of the United States Treasury Department, (b) has not been appointed by the President of the United States, (c) has not been confirmed by the Senate of the United States.

69. That the defendant Porter (a) is not an offi-

Exhibit "A"—(Continued)

cer of the United States Treasury Department, (b) has not been appointed by the President of the United States, (c) has not been confirmed by the Senate of the United States.

70. That the defendant Elvidge (a) is not an officer of the United States Treasury Department; (b) has not been appointed by the President to any office in the Treasury Department of the United States, (c) has not been confirmed by the Senate of the United States to any office in the Department of the Treasury of the United States.

71. That Section 3901, Title 26, USCA provides the powers and duties of the Commissioner of Internal Revenue.

(a) That the Commissioner of Internal Revenue acts under the direction of the Secretary of the Treasury.

(b) That no part of this section gives the Commissioner of Internal Revenue any authority, duty or power with respect to any taxes other than United States internal revenue taxes.

72. That Section 3905, Title 26, USCA provides for an Assistant to the Commissioner of Internal Revenue who must be appointed by the President and confirmed by the Senate.

73. That Section 3905, Title 26, USCA provides for Deputy Commissioners of Internal Revenue who must be appointed by the President and confirmed by the Senate.

74. That none of the defendants herein are As-

Exhibit "A"—(Continued)

sistant Commissioners or Deputy Commissioners of Internal Revenue.

75. That Section 3940, Title 26, USCA as amended by the Organization Plan No. 1, Section 1, of 14 March 1952, limits the District Directors of Internal Revenue to a number not exceeding 25.

76. That the unincorporated territory of Guam has not been included in any collection district of the United States.

77. That none of the defendants herein have been appointed District Director of Internal Revenue.

78. That Section 3971 (a), Title 26, USCA provides that all taxes and revenues received under the provisions of this title and collected, of whatsoever nature, received and collected by authority of any internal revenue law (a) shall be paid daily into the Treasury of the United States, (b) under instructions of the Secretary of the Treasury, (c) as Internal Revenue collections by the officer receiving or collecting the same, (d) without any abatement or deduction or claims of any description.

79. That the sums of money collected pursuant to the claimed territorial income tax have not been paid into the Treasury of the United States.

80. That the Commissioner of Internal Revenue has no function in connection with a territorial income tax.

81. That no Tax Court exists within the unincorporated territory of Guam.

82. That the Tax Court of the United States has

Exhibit "A"—(Continued)

no jurisdiction with respect to the claimed territorial income tax.

83. That the claimed territorial income tax is not a part of the internal revenue tax of the United States.

84. That no statute of the Government of Guam provides for requiring the filing of an income tax return.

85. That no statute of the Government of Guam provides a penalty for failure to (a) file an income tax return, (b) pay an income tax.

86. The Federal Insurance Contribution Act (a) is not enforced in Guam, (b) is not part of the claimed territorial income tax, (c) is a tax upon income.

87. The tax on Employees Representatives (a) is not enforced on Guam, (b) is not part of the claimed territorial income tax, (c) is a tax upon income.

88. The tax imposed by Section 1600 Title 26, USCA is claimed to be part of the territorial income tax.

89. The tax imposed by Section 1600 Title 26, USCA is collected by the Government of Guam.

90. That Section 1410, Title 26, USCA imposes a United States excise tax.

91. That the Government of Guam issued an official form with respect to income tax known as Government of Guam Form No. 209.

(a) That this form contained instructions for the

Exhibit "A"—(Continued)

preparation of protests against findings by examining officer with respect to income tax.

(b) That this form contained the appellate rights of a taxpayer under the claimed income tax, including the right to review by regional offices of the United States Internal Revenue Board, the right to file a petition to the Tax Court of the United States, the right of appeals from the Tax Court of the United States to a United States Circuit Court of Appeals, the right to have income tax controversies reviewed by the technical staff of regional offices of the United States Bureau of Internal Revenue.

92. That in fact none of the appellate or other rights set forth in the next question preceding exist.

93. That no technical staff exists in the Government of Guam with respect to the territorial income tax.

94. That no provision exists in the codes of Guam authorizing any adjustment or settlement of any claimed income tax liability.

95. That no provision of the codes of Guam require any person to be admitted to practice before the United States Bureau of Internal Revenue or the Tax Court of the United States before representing any claimant or taxpayer in any internal revenue proceedings.

96. That no provisions exist by which any tax case within the purview of the territorial income tax of Guam can be referred to any regional office and to the technical staff for review.

Exhibit "A"—(Continued)

97. That under the claimed territorial income tax the following sums have been collected from:

(a) The Plaintiff Wilson (1) for the year 1952, \$1,136.80; (2) for the year 1953, \$1,476.80.

(b) The Plaintiff White (1) for the year 1951, \$1,147.90; (2) for the year 1953, \$1,723.30.

98. That the Plaintiffs Bogovich and Tintorri have withheld from employees and paid over under the claimed territorial income tax during the period 1951 to 1953 sums in excess of \$3,600.00.

99. That Sections 1400-1403, 1410, 1411, 1420, 1421, 1423-1431 of Title 26, USCA are not part of the claimed territorial income tax law.

100. That Sections 1500-1503, 1510-1512, 1520-1522, 1530-1532, 1534-1537 are not part of the claimed territorial income tax law.

101. That Sections 1600-1611 are not part of the claimed territorial income tax law.

102. That Sections 1621-1627, 1630-1636, of Title 26 USCA are (a) not part of the claimed territorial income tax law, (b) do not impose a tax, (c) create collection procedures for use in the United States.

103. That the United States Attorney General has not delegated to officers of the Government of Guam any duties in connection with income tax.

104. That the Secretary of the Treasury is not authorized to delegate to officers of the Government of Guam (a) any powers of the Treasury Department, (b) any authority of the Treasury Department, (c) any duties of the Treasury Department.

105. That defendants Taitano and Kennedy have

Exhibit "A"—(Continued)

issued and published Income Tax Regulations for the territorial income tax numbered 1, 2, 3, and 4.

106. That Title XX of the Government Code of Guam contains the tax laws of the unincorporated territory of Guam.

107. That (a) Chapter 1, Title XX, Government Code of Guam has been repealed. (b) That Chapters 2, 3, 4, 5, and 6, Title XX, Government Code of Guam specifically refer only to the taxes therein levied.

108. That Title XX of the Government Code of Guam does not impose a territorial income tax.

109. That Title XX, Government Code of Guam, does not provide procedures or authority for the collection of a territorial income tax.

[Printer's Note: Attached Request for Admission of Facts requested by Ford Q. Elvidge, Howard D. Porter and Richard Taitano are duplicates of Request for Admission of Facts printed at page 19, and each signed by Finton J. Phelan, Jr., and E. R. Crain, Attorneys for Plaintiffs.]

[Endorsed]: Filed July 20, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION

To: Howard D. Porter, Louis A. Otto, Richard Rosenberry and Leon D. Flores, Attorneys for Defendants, Office of the Attorney General, Government of Guam, Agana, Unincorporated territory of Guam.

Please take notice that upon the pleading filed herein and all the documents, files, and exhibits and upon all the proceedings in the instant case, the undersigned will make a cross-motion before the District Court of Guam in the Courtroom of said Court in the Guam Congress Building in the City of Agana, Unincorporated territory of Guam, on Friday, the 30th day of July, 1954, at the hour of 0930 a.m., or as soon thereafter as counsel can be heard, for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure directing that summary judgment herein be entered in favor of the plaintiffs and for such other and further relief as the Court may deem just.

Dated this 19th day of July, 1954.

[Seal] /s/ FINTON J. PHELAN, JR.,
 E. R. CRAIN,
 Attorneys for Plaintiffs

[Endorsed]: Filed July 20, 1954.

[Title of District Court and Cause.]

MOTION

Now come the defendants, B. L. Kennedy, Ford Q. Elvidge, Howard D. Porter, and Richard Taitano, and respectfully move this court to extend for thirty (30) days from the 29th day of July, 1954, the time to serve and file their respective sworn statements or written objections, as the case may be in response to the plaintiffs' request for admissions of fact in the above-entitled cause, and in support of said motion show the court that the granting of this motion will expedite the determination of this cause and will further the administration of justice for the following reasons:

(1) That there is now pending before this court defendants' motions to dismiss and for summary judgment which have been set for hearing by this court on the 30th day of July, 1954; and

(2) That the primary purpose of rule 36 of the Federal Rules of Civil Procedure, under which the plaintiffs have filed their request for admissions of fact, is to expedite the trial of the cause and to relieve the parties of the burden and costs of proving facts which will not be disputed at the trial; and

(3) That the primary purpose of rules 12 and 56 of the Federal Rules of Civil Procedure is to expedite the determination of the case without a trial where no substantial merit exists in the complaint; and

(4) That a determination of the defendants' preliminary motions in favor of the defendants would effectuate a determination of this cause and

foreclose the plaintiffs' right to the requested admissions sought; and

(5) That if this motion for extension of time be granted, the court and the parties concerned will avoid a spurious hearing and unnecessary work on the defendants' objections to the requested admissions of fact, should defendants' motions to dismiss and for summary judgment be granted.

It is therefore respectfully requested that the defendants' motion for an order extending the time to serve and file their sworn statements or objections to the plaintiffs' requested admissions of fact be granted.

Dated this 23rd day of July, 1954.

/s/ HOWARD D. PORTER,

Attorney General; Attorney for Defendants, Office of Attorney General, Government of Guam, Agana, Guam;

/s/ LEON D. FLORES,

Island Attorney; Attorney for Defendants, Office of Attorney General, Government of Guam, Agana, Guam;

/s/ LOUIS A. OTTO. JR.,

Deputy Island Attorney; Attorney for Defendants, Office of Attorney General, Government of Guam, Agana, Guam;

/s/ RICHARD ROSEBURG,

Deputy Island Attorney; Attorney for Defendants, Office of Attorney General, Government of Guam, Agana, Guam.

[Endorsed]: Filed July 23, 1954.

[Title of District Court and Cause.]

ORDER ON MOTION FOR CONTINUANCE

This cause coming on to be heard this 27th day of July, A.D., 1954 on defendants' motion for an order extending the time in which the defendants may serve or file sworn statements or written objections to the plaintiffs' request for admissions, and the plaintiffs being agreeable to such continuance,

Now, Therefore, it is herewith ordered:

1. The defendants shall have until August 26, 1954 in which to file answers or objections;

2. The motions heretofore filed by the defendants for dismissal and for summary judgment and the motion heretofore filed by the plaintiffs for summary judgment shall be continued from July 30, 1954 to August 27, 1954.

Dated and entered this 27th day of July, A.D., 1954.

/s/ PAUL D. SHRIVER,
Judge

[Endorsed]: Filed July 27, 1954.

[Title of District Court and Cause.]

AFFIDAVIT

E. R. Crain, being first duly sworn, deposes and says:

1. That he is an attorney-at-law, licensed to practice in the territory of Guam.

2. That sometime in the year 1953, he was employed by Hubert and Virginia Borgstadt, husband and wife, in reference to certain demands then being made upon them by one B. L. Kennedy, who styled himself Commissioner of Revenue and Taxation, Department of Finance, Government of Guam. Said letters of demand stated that the said Hubert and Virginia Borgstadt owed the Government of Guam the sum of Six Hundred Four Dollars and Twenty Cents (\$604.20), which the said B. L. Kennedy termed a deficiency in their payment of income taxes to the Government of Guam for the year 1952.

3. That included in the letters, reports, explanations, waivers and item adjustments forwarded with his letter, the said B. L. Kennedy enclosed Guam Government Form No. 209, labelled "Instructions as to the Preparation of Protests Against Findings of Examining Officers." A copy of said form is attached hereto and marked Exhibit "A". On the reverse side of said Government of Guam Form No. 209 is a series of paragraphs headed "Your Appellate Rights".

4. That he complied to the satisfaction of the said B. L. Kennedy with the instructions set out on the face of Guam Government Form No. 209, and filed with the said B. L. Kennedy a protest of notice of deficiency on behalf of Hubert and Virginia Borgstadt.

5. That he was subsequently informed that as the representative of the said Hubert and Virginia Borgstadt, he would be given a hearing before a

Mr. Louis Otto, Jr., an Assistant Attorney General of the Government of Guam.

6. That the said Louis Otto, Jr. at said hearing stated that he constituted the same parties to whom appeal might be made by appellates as were set out in paragraph 2 of that statement labelled "Your Appellate Rights" hereinabove mentioned.

7. That after the conclusion of said hearing before the said Mr. Louis Otto, Jr., the said Mr. Otto informed him that he would be notified of the decision reached by Mr. Otto as a result of the hearing.

8. That he inquired of the said Mr. Otto concerning his right to file a petition with the Tax Court of the United States as set out in paragraph 3 of that portion of Guam Government Form No. 209, labelled "Your Appellate Rights", and that he was informed by Mr. Otto that there was no tax court for the Government of Guam, that the Tax Court of the United States had no jurisdiction in the event such a petition were filed there, and that it made no difference whether the appellates had any recourse to a tax court or not.

9. That there has been turned over to him a letter dated April 2, 1954, which letter is marked Exhibit "B" and attached hereto, in the third paragraph of which letter it is stated that appellates shall have ninety (90) days from the date of the mailing of that letter in which to take such action as may be authorized by law to contest the determination of the deficiency.

10. That in spite of repeated requests by him for information as to what action might be author-

ized by law to contest the determination of the deficiency, neither Mr. Louis Otto, Jr. nor Mr. B. L. Kennedy were able to furnish him with such information.

Further deponent sayeth not.

Dated this 26th day of August, 1954.

/s/ E. R. CRAIN

Subscribed and Sworn to before me this 26th day of August, 1954.

/s/ By ROLAND A. GILLETTE,
Clerk of the District Court of
Guam.

EXHIBIT "A"

Instructions As to the Preparation of Protests Against Findings of Examining Officers

The protest and any additional statement of facts must be submitted to this office within 30 days of the date of the letter with which these instructions are enclosed. Such protest and statement must be submitted in triplicate under oath of the taxpayer (in the case of a corporation, the oath of a duly constituted officer). The oath requirement may be satisfied by executing the original of the protest under oath and conforming the remaining copies to the original, that is, by making the copies identical with the original except that, in lieu of the signatures of the executing parties appearing on the

original, the names of the executing parties may be inserted on the copies by typewriter or otherwise. The protest must contain the following information:

(a) The name and address of the taxpayer (in the case of an individual, the residence, and in the case of a corporation, the principal office or place of business);

(b) The designation by date and symbol of the letter advising of the proposed adjustments in tax liability with respect to which the protest is made;

(c) The designation of the year or years involved;

(d) An itemized schedule of the findings to which the taxpayer takes exception;

(e) A statement of the facts upon which the taxpayer relies with respect to each issue it is desired to contest. No reduction in taxes proposed nor increases in allowance of claims will be made unless the facts relied upon are submitted in writing and in verified form. All evidence except that of a supplementary or incidental character shall be submitted over the sworn signature of the taxpayer;

(f) In case the taxpayer desires a hearing, a statement to that effect. In such case the sworn statement of facts referred to in (e) must be submitted at least 5 days before the conference date. If the 5-day rule cannot be complied with, the statement of facts must be accompanied by a sworn statement specifying the reasons therefor;

(g) In case the protest is prepared or filed by an attorney or agent, in addition to the signature of

the taxpayer, it shall have thereon a statement signed by such attorney or agent showing whether or not he prepared it and whether or not the attorney or agent knows of his own knowledge that the facts therein are true; and

(h) In case the taxpayer is represented by an attorney or agent, it is essential that such representative be admitted to practice before the United States Treasury Department and be provided with a power of attorney, signed by the taxpayer, authorizing him to act for the taxpayer. Powers of attorney must be furnished in duplicate with one additional copy for each taxable year in excess of one.

(i) Attention of representatives is called to the necessity of filing with this office a "Statement Relative to Fees" as required by section 2(y) Treasury Department Circular No. 230.

(See over for your appellate rights)

Your Appellate Rights

Upon receipt of a letter from the office of the Collector of Internal Revenue or the Internal Revenue Agent in Charge advising you of a proposed adjustment of your tax, you may execute an agreement form consenting to the adjustment or file a protest with the office from which the letter was received, and request a hearing in that office if one is desired, in accordance with the instructions on the reverse hereof. If a hearing is arranged, you may appear personally or be repre-

sented by an attorney or agent, also as provided in the instructions. If the protest is filed with the Collector's office and an agreement is not reached in that office, your case will be transferred to the office of the Internal Revenue Agent in Charge for further consideration and conference if desired.

If your case is one which originated in the Collector's office but which because of nonagreement is transferred to the office of the Internal Revenue Agent in Charge for further consideration, and an agreement is not reached in that office, or if it is one which originated in the Agent's office, but after protest an agreement is not reached in that office, you may request that your case be referred to the appropriate Regional Office of the Technical Staff, the appellate agency of the Bureau, for further consideration. You may also request a hearing before representatives of that office.

In the event an agreement is not reached in the Technical Staff, your case, if a deficiency is involved, will be returned to the office of the Internal Revenue Agent in Charge for issuance of a final notice of deficiency in which you will be granted 90 days within which to file a petition with The Tax Court of the United States.

If a petition is filed, your case after docketing, will be referred to the Regional Office of the Technical Staff, which office will afford you a further opportunity to settle your case without the necessity of a trial before The Tax Court. If a settlement cannot be reached, your case will be set down for hearing before the Court.

Appeal from the decision of The Tax Court may be made to the United States Circuit Court of Appeals.

If an overassessment only is proposed, the procedure is the same as above, except that your appellate rights do not extend beyond the Technical Staff, unless the case involves a claim for refund disallowed in whole or in part. In such case, you may file suit with the United States District Court or the United States Court of Claims depending upon the amount of the claim.

EXHIBIT "B"

Government of Guam
Agana, Guam

Date: April 2, 1954

Herbert & Virginia Borgstadt
Station 1, House 57
Agana, Guam M.I.

Dear Sir and Madam:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1952, discloses a deficiency of \$604.20, as shown in the statement attached.

In accordance with the provisions of existing Internal Revenue Laws, notice is hereby given of the deficiency mentioned.

Within ninety (90) days from the date of the mailing of this letter, you may take such action as

may be authorized by law to contest the determination of the deficiency.

Should you not desire to take such action you are requested to execute the enclosed agreement form and forward it to this office.

Very truly yours,

/s/ B. L. KENNEDY,

Commissioner of Revenue and
Taxation.

Enclosures, Statement, Agreement Form.

[Endorsed]: Filed August 26, 1954.

[Title of District Court and Cause.]

OBJECTIONS OF DEFENDANT B. L. KENNEDY
TO REQUEST OF PLAINTIFFS
FOR ADMISSION OF FACTS

Now comes the defendant B. L. Kennedy, by his attorneys, and objects to the following numbered items of Exhibit "A" accompanying plaintiffs' request for admission of facts:

1. The following items ask for admission of conclusions of law: 1, 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 71, 72, 73, 75, 76, 78, 80, 81, 82, 83, 84, 85, 86, 87, 88, 90, 91, 92, 93, 94, 95, 96, 99, 100, 101, 102, 103, 104, 106, 107, 108, 109.

These requested admissions, all calling for conclusions of law, can be classified into a number of groups:

(a) Admissions as to whether or not certain legislation exists, and if it does exist, what it consists of or does not consist of, such as items 1, 2, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 30, 31, 32, 33, 53, 64, 65, 83, 84, 85, 88, 94, 95, 96, 99, 100, 101, 102, 107.

(b) Admissions as to an interpretation of various statutes, what they provide or do not provide, such as Items 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 49, 50, 51, 52, 54, 55, 56, 63, 66, 71, 72, 73, 75, 78, 86, 87, 90, 102, 106, 107, 108, 109.

(c) Admissions as to whether certain authority has been delegated such as Items 47, 48, 57, 58, 59, 60, 61, 62, 103.

(d) Admissions as to whether "interpretations" have been made of the law, such as Items 26, 27, 28, 29.

(e) Such miscellaneous admissions as whether the Government of Guam has taken certain official actions (Items 7, 91); whether the taxpayer has "appellate or other rights" (Item 92); whether a "technical staff" exists (Item 93); whether a tax court exists and what is its jurisdiction (Items 81, 82); as to the function of the Commissioner of Internal Revenue (Item 80); whether Guam is in a collection district (Item 76); whether the Secretary of the Treasury has authority to delegate (Item 104); whether defendants acted through "agents and servants" (Items 24, 25); whether defendants

“personally * * * accepted payments” (Items 24, 25).

Rule 36 is clear in indicating that it provides for admissions of fact and not of law. It is also so interpreted in *Fidelity Trust Co. vs. Village of Stickney*, 129 F.(2d) 506, where the court ruled that a request for an admission that certain village bonds which had been cancelled were not used to pay property assessments, was a request for a conclusion of law and improper. The Court pointed out that the requested admission was one of the questions in litigation.

“Under the plaintiff’s construction of the statute, it (payment) was unauthorized. Under the defendant’s construction, it was authorized. To ask the defendant to admit the property owners had not used bonds to pay their assessments and that the cancelled bonds were not paid and cancelled, was not a request for facts but a conclusion of law, and that was the heart of the case.”

In the present case the requests objected to are also admissions of law that go to the heart of the case where they are not also irrelevant as hereinafter pointed out. They, in effect, ask the defendants to admit that there is no Guam Territorial Income Tax and that whatever tax there is, the Government of Guam and its officials have no authority to enforce it.

2. The following items are irrelevant: 7, 10, 11 through 22 (except sub-item “j” in each item), 30,

31, 32, 34, 35, 36, 37, 40, 41, 42, 43, 44, 45, 46, 47, 48, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 80, 81, 82, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97 (with respect to amounts prior to May 14, 1952), 98 (with respect to amounts prior to May 14, 1952), 99, 100, 101, 103, 104, 105, 106, 107, 108, 109.

The basic theory of the complaint is that Section 31 of the Organic Act of Guam does not provide for a territorial income tax, but whether it does or does not, the defendants are usurpers as far as any authority to enforce the tax is concerned, and plaintiffs are entitled to a personal judgment for the amount of income taxes previously paid, including amounts withheld by them, as employers, from their employees, or withheld from them as employees by their employers and allegedly paid to the defendants. The court is further asked to restrain the defendants from enforcing the tax and to declare that Section 31 of the Organic Act does not create a territorial income tax.

The items from Appendix "A" enumerated under defendants' second objection are not relevant with respect to the issues of the case, besides, in many instances, as previously indicated, being objectionable as conclusions of law. They can be grouped generally as follows:

(a) Admissions clearly concerned with statutes that have no connection with the specific taxes which constitute the basis of the complaint, such as Items 10 (in fact the Chapters mentioned in 10a,

10n, and 10cc were repealed in 1945, 1942, and 1945, respectively), 86, 87, 88, 89, 90, 99, 100, 101, 106, 107, 108, 109.

(b) Admissions dealing with remedies and procedures, or lack of remedies and procedures, which do not concern the question of whether Section 31 of the Organic Act establishes a territorial tax, or the specific taxes on which the complaint is based, or the authority of the defendants, such as Items 31, 32, 40, 41, 42, 43, 55, 81, 82, 84, 85, 91, 92, 93, 94, 95, 96.

(c) Admissions dealing with authority or lack of authority, or official status or lack of official status, which clearly have no connection with the authority of defendants with respect to the territorial income taxes which are the basis of the complaint, such as Items 11 through 22 (except sub-item "j" in each), 34, 35, 44, 45, 46, 47, 48, 55, 56, 57, 58, 59, 60, 61, 62, 66, 67, 68, 69, 70, 71, 72, 73, 74, 77, 80, 102, 104.

(d) Items 97 and 98 are irrelevant to the complaint and all defendants individually with regard to any sums collected, withheld as wages, or paid as taxes prior to May 14, 1952, the date Defendant Richard Taitano assumed the duties of his office as Director of Finance, which is the earliest date any defendant assumed the duties of his office in Guam. As to each other individual defendant, these items are also irrelevant in so far as they refer to periods prior to each defendant's assumption of the duties of his office in Guam, the dates of which are:

B. L. Kennedy, March 27, 1953, as Commissioner of Revenue and Taxation; Ford Q. Elvidge, April 23, 1953, as Governor of Guam; Howard D. Porter, August 31, 1953, as Attorney General of Guam.

(e) Items 36 and 37 concern collection districts and 63, 64, 65 definitions of terms, none of which have any application to the issues of the case.

(f) Items 7 and 105 are concerned with whether or not territorial income tax regulations have been published or issued and by whom, matters extraneous to the issues of the case.

3. Items 23b, 23c, 23e, 91 and 105 in effect deal with the authenticity of documents, and in accordance with Rule 36, copies of the cited documents should be attached to the requests.

4. Items 23 is objected to for a number of reasons.

The phrase "defendants and other agents of the Department of Finance" is ambiguous in that it suggests all four defendants are "agents of the Department of Finance."

The various sub-items cite numerous types of acts, apparently ascribed to all the defendants without reference to any particular time and place. Such broadside requests for admissions are not contemplated under Rule 36. To meet such broad, general statements imposes an intolerable, if not impossible, burden on the defendants.

A number of the sub-items, 23b, 23c, 23e refer

to documents, copies of which should be attached.

Sub-item 23f calls for a conclusion of law.

Defendant accordingly requests that the foregoing objections be sustained.

/s/ HOWARD D. PORTER,
Attorney General

/s/ LEON D. FLORES,
Island Attorney

/s/ LOUIS A. OTTO, JR.,
Deputy Island Attorney

/s/ RICHARD ROSENBERRY,
Deputy Island Attorney
Attorneys for Defendant

[Printer's Note: Attached Objections to Request of Plaintiff for Admission of Facts filed by Ford Q. Elvidge, Howard D. Porter and Richard Taitano are duplicates of Objections to Request of Plaintiffs for Admission of Facts printed at pages 59-65, and each signed by Howard D. Porter, Leon D. Flores, Louis A. Otto, Jr., and Richard Rosenberry, Attorneys for Defendant.]

[Endorsed]: Filed August 26, 1954.

[Title of District Court and Cause.]

REPLY OF DEFENDANT B. L. KENNEDY
TO REQUEST OF PLAINTIFFS FOR AD-
MISSION OF FACTS

Now comes the defendant B. L. Kennedy, by his attorneys, and in response to the request of plaintiffs for admission of facts, under Rule 36, hereby states as follows with regard to the following items of Exhibit "A" accompanying said request:

1. Items 3, 4, and 79 are admitted as true.
2. With respect to Item 97 generally, the defendants assumed the duties of their respective offices in Guam as follows: Richard Taitano, May 14, 1952, as Director of Finance, Government of Guam; B. L. Kennedy, March 27, 1953, as Commissioner of Revenue and Taxation, Department of Finance, Government of Guam; Ford Q. Elvidge, April 23, 1953, as Governor of Guam; Howard D. Porter, August 31, 1953, as Attorney General of Guam. Requests for admissions as to collection of income taxes prior to May 14, 1952 are irrelevant as to the complaint and all defendants individually. Requests for admissions as to collection of income taxes are irrelevant as to each individual defendant in so far as they refer to periods prior to each defendant's assumption of the duties of his office in Guam.

As to Sub-Item 97a(1), according to the records of the Department of Finance, Plaintiff John Wilson has not filed any 1952 income tax return, but his employer, Brown-Pacific-Maxon, withheld from

his 1952 wages a total of \$1,136.80 and paid such amount into the Treasury of the Government of Guam as withholding tax. The date or dates on which such sum, in whole or in part, was withheld from Plaintiff Wilson's wages and paid into the Treasury of the Government of Guam, is not reflected in the records of the Department of Finance, so that defendant has no knowledge as to what portion of said \$1,136.80 was withheld and paid on or after May 14, 1952, except that final payment by Brown-Pacific-Maxon of withholdings from its employees' wages generally was made on January 6, 1953.

As to 97a(2), according to the records of the Department of Finance, Plaintiff John Wilson filed his 1953 income tax return on March 15, 1954, showing a tax liability on such return of \$1,751.82 and a withholding credit of \$1,476.80, leaving a balance of \$275.02 which is unpaid; said \$1,476.80 withholding credit represents sums withheld from Plaintiff Wilson's wages by his employer, Brown-Pacific-Maxon, and paid by such employer into the Treasury of the Government of Guam as withholding tax.

As to 97b(2), according to the records of the Department of Finance, Plaintiff Leonard White has not filed any 1953 income tax return, but his employer, Brown-Pacific-Maxon, withheld from his 1953 wages a total of \$1,723.30 and paid such amount into the Treasury of the Government of Guam as withholding tax.

3. With respect to Item 98 generally, requests

for admissions as to withholding of wages by Plaintiffs Paul Bogovich and Elizabeth Tintorri from their employees and payment over of such sums so withheld as part of the territorial income tax prior to May 14, 1952 are irrelevant as to the complaint and all defendants individually, as stated in preceding paragraph 2. Such requests are also irrelevant as to each individual defendant in so far as they refer to periods prior to each defendant's assumption of the duties of his office in Guam.

According to the records of the Department of Finance, Plaintiffs Bogovich and Tintorri paid into the Treasury of the Government of Guam the sum of \$189.30 on July 29, 1952, covering, according to the tax return of such plaintiffs, withholdings from wages of their employees for the first quarter of 1952. The dates on which specific amounts of wages were withheld from time to time, as to all such plaintiffs' employees, collectively or individually, is not reflected in the records of the Department of Finance, so that defendants have no knowledge as to what portion of said \$189.30 was withheld on or after May 14, 1952.

According to the records of the Department of Finance, Plaintiffs Bogovich and Tintorri paid into the Treasury of the Government of Guam the sum of \$422.20 on August 15, 1952 covering according to the tax return of such plaintiffs, withholdings from wages of their employees for the second quarter of 1952. The dates on which specific amounts of wages were withheld from time to time, as to all such plaintiffs' employees, collectively or individu-

ally, is not reflected in the records of the Department of Finance, so that defendant has no knowledge as to what portion of said \$422.20 was withheld on or after May 14, 1952.

According to the records of the Department of Finance, Plaintiffs Bogovich and Tintorri paid into the Treasury of the Government of Guam the following sums, covering, according to the tax returns of such plaintiffs, withholdings from wages of their employees:

(a) \$432.40 on October 21, 1952 for the third quarter of 1952.

(b) \$553.45 on February 2, 1953 for the fourth quarter of 1952.

(c) \$454.30 on April 30, 1953 for the first quarter of 1953.

(d) \$229.20 on August 4, 1953 for the second quarter of 1953.

(e) \$319.00 on November 2, 1953 for the third quarter of 1953.

(f) \$280.00 on February 3, 1954 for the fourth quarter of 1953.

/s/ HOWARD D. PORTER,
Attorney General

/s/ LEON D. FLORES,
Island Attorney

/s/ RICHARD ROSENBERRY,
Deputy Island Attorney

/s/ LOUIS A. OTTO, Jr.,
Deputy Island Attorney
Attorneys for Defendant

Richard Taitano, being duly sworn, states that he is and has been Director of Finance of the Government of Guam since May 14, 1952; that B. L. Kennedy served under his direction and supervision as Commissioner of Revenue and Taxation, Department of Finance, from March 27, 1953 until April 28, 1954, the effective date of B. L. Kennedy's resignation, and is presently not in Guam; and that the facts stated in the foregoing reply to request of plaintiffs for admission of facts are true according to his information and belief.

/s/ RICHARD TAITANO,

Sworn to and subscribed in my presence August 26th, 1954.

[Seal] /s/ V. E. ZAFRA,
Notary Public

[Printer's Note: Attached Reply to Requests of Plaintiffs for Admission of Facts filed by Ford Q. Elvidge, Howard D. Porter and Richard Taitano are duplicates of Reply to Request of Plaintiffs for Admission of Facts printed at pages 66-69, and signed by Howard D. Porter, Ford Q. Elvidge and Richard Taitano respectively.]

[Endorsed]: Filed August 26, 1954.

[Title of District Court and Cause.]

NOTICE OF HEARING DEFENDANTS'
OBJECTIONS

To: Finton J. Phelan, Jr., and E. R. Crain, Attorneys for Plaintiffs.

Please take notice that the foregoing objections will be brought on for hearing before the Honorable Paul D. Shriver, Judge of the above-entitled court, in the said courtroom in the Guam Congress Building on Friday, the 27th day of August, 1954, at 9:30 a.m., or as soon thereafter as counsel can be heard.

Dated this 26th day of August, 1954.

/s/ HOWARD D. PORTER,
Attorney General.

/s/ LEON D. FLORES,
Island Attorney.

/s/ LOUIS A. OTTO, Jr.,
Deputy Island Attorney.

/s/ RICHARD ROSENBERRY,
Deputy Island Attorney.

[Endorsed]: Filed August, 26, 1954.

In the District Court of Guam,
Territory of Guam

Civil Case No. 27-54

JOHN WILSON, et al., Plaintiffs,

vs.

B. L. KENNEDY, et al., Defendants.

OPINION

This matter is before the court on a motion to dismiss for failure to state a cause of action and lack of jurisdiction, and summary judgment as a matter of law filed by the defendants. The plaintiffs have moved for summary judgment. There are in the record briefs, requests for admissions of fact, objections and answers to such requests for admissions of fact, but in the view of the court the basic issues are clear and any detailed discussion will tend to complicate rather than clarify the issues.

The plaintiffs are two employers and two employees of different employers. Their complaint alleges that the defendants, acting without authority, required the plaintiffs and others similarly situated to pay income taxes which were used by the Government of Guam. The plaintiffs request a judgment to the effect that the defendants repay the taxes illegally collected, be enjoined from future illegal collections, and that a declaratory judgment be entered in effect holding that there is no effective territorial income tax law in Guam. The plaintiffs do not contend that if there is an effective income

tax law, and if the defendants are the proper persons to collect that tax, that the plaintiffs have paid more than the law requires them to pay, nor do they contend that any amounts paid by them did not reach the Guam Treasury.

This case is a continuance of the so far abortive effort on the part of some taxpayers to avoid the payment of income taxes on income earned in Guam. The defendants are sued as individuals, but they are the former Commissioner of Revenue and Taxation for Guam, and the present Governor, Attorney General, and Director of Finance for Guam, respectively. In their official capacities they are charged with responsibility for tax collection, but there is no specific statute enacted by the Guam Legislature or by the United States Congress which authorizes them to levy and collect income taxes. Such authority, if it exists, must flow by necessary implication from the law creating the tax and the logical assumption that the United States Congress intended that the tax should be collected and used for the benefit of the Government of Guam. The pertinent provisions are Sections 30 and 31 of the Organic Act of Guam.¹

¹ 48 U.S.C.A. 1421h. Duties and taxes to constitute fund for benefit of Guam.

All customs duties and Federal income taxes derived from Guam, the proceeds of all taxes collected under the internal-revenue laws of the United States on articles produced in Guam and transported to the United States, its Territories, or possessions, or consumed in Guam, and the proceeds of any other taxes which may be levied by the Con-

In an action for a declaratory judgment against the Government of Guam involving these provisions it was held that the Government of Guam has sovereign immunity from suit without its consent.² in that case the Court of Appeals pointed out that it offered no expression of opinion on the questions as to the right to sue a tax collector as agent of Guam; or the liability at common law of a tax collector as an individual, citing *Great Northern Life Insurance Company vs. Read*, 322 U.S. 47, 64 S.Ct. 873.

*Laguana vs. Ansell*³ brought before the court and answered many of the questions raised by these plaintiffs. In the *Laguana* case the issues were not, however, clouded by extraneous details. *Laguana* contended that *Ansell* had required his employer to withhold and pay income taxes which were exempt from taxation by the United States in the unincorporated territory of Guam within the meaning of

gress on the inhabitants of Guam, and all quarantine, passport, immigration, and naturalization fees collected in Guam shall be covered into the treasury of Guam and held in account for the government of Guam, and shall be expended for the benefit and government of Guam in accordance with the annual budgets. Aug. 1, 1950, c. 512, 30, 64 Stat. 392.

48 U.S.C.A. 1421i. Applicability of Federal income tax laws.

The income-tax laws in force in the United States of America and these which may hereafter be enacted shall be held to be likewise in force in Guam. Aug. 1, 1950, c. 512, 31, 64 Stat. 392.

² *Crain vs. Government of Guam*, 97 F. Supp. 433, aff. 195 F.2d 414.

³ 102 F. Supp. 919, aff. 212 F.2d 207.

Section 31. The United States intervened. It was conceded that if Section 31 created a territorial income tax to be collected by the proper officials of the Government of Guam, Laguana had no action. This court discussed at length the legislative history and precedents and held that the effect of Section 31 is to impose a territorial income tax to be collected by the proper officials of the Government of Guam. The Court of Appeals affirmed by per curiam opinion for the reasons given in the opinion of this court.

The Laguana case disposed of any question as to the imposition of the tax and the obligation to pay the tax to the proper officials of the Government of Guam. The plaintiffs in the instant case apparently contend, however, that there are no officials of the Government of Guam who have authority to collect the tax and that those officials who pretended to exercise such authority must repay the amounts collected. In the first place we must distinguish between Section 31, which makes the income tax laws in force in the United States of America, current and future, in force in Guam, and any authority the Guam Legislature may have to legislate in the field. The United States Congress as the parent legislative body made the "income tax laws" applicable. We are dealing with a law of the United States. In this complex field it would appear that the Congress intended to do more than just levy taxes. It intended that the taxpayer on Guam should be governed by the income tax laws in force in the United States at any given time. Like the

taxes themselves, enforcement of collection must necessarily vary or change at the will of the Congress. If the Government of Guam has available facilities to carry out that will, a taxpayer can hardly be heard to complain that he would prefer some different system of collection. As early as 1935 the Treasury Department of the United States ruled in connection with a similar tax in the Virgin Islands⁴ that it will be necessary in some sections of the law (Revenue Act of 1934) to substitute the words "Virgin Islands" for the words "United States" in order to give the law proper effect in those islands, and it followed that precedent as regards Guam.⁵

The plaintiffs further complain that the Government of Guam has not established a tax court to consider appeals, but that neglect presents no question which is of justiciable concern to these plaintiffs if their taxes were properly levied and collected. The individual defendants are:

(a) The Governor of Guam who is charged with responsibility faithfully to execute the laws of the United States applicable to Guam and the laws of Guam, 48 U.S.C.A. 1422(b), 64 Stat. 386.

(b) The Attorney General of Guam who is head of the Department of Law for that government, Government Code of Guam, Section 5101.

(c) The Director of Finance who is the head of

⁴ I.T. 2946 (C.B. XIV-2, 109).

⁵ 1951-6-13559 I.T. 4046.

the Department of Finance, Government of Guam, Government Code of Guam, Section 5100.

(d) Commissioner of Revenue and Taxation who enforces and administers the territorial income tax (affidavit of Director of Finance).

In the view of this court these plaintiffs can rest secure that those defendants are neither interlopers nor imposters but that they are the duly appointed officials whose responsibility includes the collection of income taxes under Section 31, the appropriate provisions of the United States Revenue Code, and applicable laws of Guam.

Judging from the absence of reported litigation, the income taxpayers in the Virgin Islands have had no difficulty in determining to what officials their territorial income taxes should be paid, although the law affecting them was enacted in the Naval Appropriations Act of 1921, 42 Stat. 122, and was the same as Section 31:

“except that the proceeds of such taxes shall be paid into the treasuries of said islands.”

This court is not unaware of the possibilities of conflicts between two taxing jurisdictions in an appropriate case, but we have no conflict here as these plaintiffs, for themselves and those similarly situated, allege that they are residents of Guam and the income upon which the taxes were levied was earned in Guam. By its intervention in the Laguana case the United States made it abundantly clear that such taxes were to be paid to the Government of Guam in accordance with the precedent set in the Virgin Islands.

The following principles appear to be basic:

1. Section 31 of the Organic Act of Guam imposes a territorial income tax to be paid to and collected by the proper officials of the Government of Guam.

2. The Director of Finance is authorized as the tax collector in Guam to enforce and receive such taxes by himself or his appointees.

3. The tax to be paid ordinarily is measured by the amount of income tax the taxpayer would be required to pay to the United States of America if the taxpayer were residing in the continental United States or its incorporated territories.

4. The applicable provisions in the United States Revenue Code to enforce the payment of the territorial income tax are "income tax laws" within the meaning of section 31 and are available to the Director of Finance or those authorized by him, subject to those non-substantive changes in nomenclature as are necessary to avoid confusion as to the taxing jurisdiction involved.

The defendants' motion for summary judgment is granted and the plaintiffs' motion for summary judgment is denied. The plaintiffs' complaint is dismissed on its merits at plaintiffs' cost.

Dated and entered this 31st day of August, A.D., 1954.

/s/ PAUL D. SHRIVER,
Judge.

[Endorsed]: Filed August 31, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that John Wilson, Leonard White, Paul Bogovich and Elizabeth Tintorri, the plaintiffs herein hereby appeal to the United States Court of Appeals for the Ninth Circuit from the opinion and final judgment of the District Court of Guam entered in this action on the 31st day of August, 1954.

Dated at Agana, Guam this 20th day of September, 1954.

/s/ FINTON J. PHELAN, JR.,

/s/ E. R. CRAIN,

Attorneys for Plaintiffs

[Endorsed]: Filed September 20, 1954.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to B. L. Kennedy, Ford Q. Elvidge, Howard D. Porter, and Richard Taitano, defendants, the sum of Two Hundred Fifty Dollars (\$250.00).

The condition of this bond is that, whereas the plaintiffs have appealed to the Court of Appeals

for the Ninth Circuit by notice of appeal filed the 20th day of September, 1954, from the opinion and judgment of this Court entered August 31, 1954, if the plaintiffs shall pay all costs adjudged against them if the appeal is dismissed or the judgment affirmed or such costs as the Appellate Court may award if the judgment is modified, then this bond is to be void, but if the defendant fails to perform this condition, payment of the amount of this bond shall be due forthwith.

/s/ JANET W. GODDARD

/s/ ELDER R. CRAIN

Signed and acknowledged before me this 20th day of September, 1954.

[Seal] /s/ ENRIQUE R. MESA,
Notary Public in and for the unincorporated territory of Guam.

[Endorsed]: Filed September 20, 1954.

[Title of District Court and Cause.]

ORDER

Upon motion of plaintiffs-appellants good cause appearing therefor:

It Is Ordered that the time within which to file the record and docket the above entitled cause in the United States Court of Appeals for the Ninth Circuit be and the same is hereby extended to and including the 30th day of November, 1954.

Dated, this 19th day of October, 1954, at Agana, Guam.

/s/ PAUL D. SHRIVER,

Judge of the District Court of
Guam

[Endorsed]: Filed October 19, 1954.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The points upon which Appellants will rely on appeal are:

1. The Court erred in dismissing the complaint.
2. The Court erred in entering summary judgment for defendants after dismissing the complaint.
3. The Court erred in not entering summary judgment for plaintiffs.
4. The Court erred in entering summary judgment in favor of defendant Kennedy.
5. The Court erred in deciding questions of fact upon affidavits at a hearing upon a motion for summary judgment.
6. The Court erred in deciding the case without considering authorities cited by plaintiffs.
7. The Court erred in finding that no controverted question of fact existed.
8. The Court erred in not finding that all requests for admissions of facts were admitted as a matter of law.
9. The Court erred in not considering admissions of counsel for defendants made in open court.

10. The Court erred in holding that the defendants, or any of them, have authority to collect income taxes under Section 31 of the Organic Act of Guam, the United States Revenue Code and applicable laws of Guam.

11. The Court erred in its interpretation of I. T. 4046.

12. The Court erred in holding that the defendants were sued in their official capacities.

13. The Court erred in its construction of the Organic Act of Guam.

14. The Court erred in its interpretation of the Laguana Case, 212 F.2d 207.

15. The Court erred in holding that applicable provisions of the United States Revenue Code are income tax laws within the meaning of Section 31 (of the Organic Act of Guam) subject to non-substantive changes in nomenclature.

16. The Court erred in failing to recognize the existence of serious questions involving Constitutional Law, the application of the Bill of Rights for Guam and the construction of statutes.

17. The Court erred in failing to comply with mandatory provisions of the Federal Rules of Civil Procedure and in failing to require compliance by the defendants with the same mandatory rules.

Dated at Agana, Guam this 26th day of November, 1954.

/s/ FINTON J. PHELAN, JR.,

/s/ E. R. CRAIN,

Attorneys for Appellants

[Endorsed]: Filed November 27, 1954.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Pursuant to Rule 75 (a) of the Federal Rules of Civil Procedure, the plaintiffs-appellants hereby designate for inclusion in the record on appeal to the United States Court of Appeals for the Ninth Circuit, taken by notice of appeal filed September 20, 1954, the following portions of the record, proceedings, and evidence in this action:

1. The complaint.
2. Order extending time of defendants to reply or answer filed May 14, 1954.
3. Motion and supporting points of defendants filed June 9, 1954.
4. Notice of Motion with attached exhibits filed June 9, 1954.
5. Plaintiffs' requests for admissions served on defendants B. L. Kennedy, Ford Q. Elvidge, Howard D. Porter and Richard Taitano on July 19, 1954.
6. Plaintiffs' Notice of Motion for summary judgment served on defendants July 19, 1954.
7. Affidavits of service of requests for admissions and notice of motion for summary judgment filed July 20, 1954.
8. Motion and notice of motion of defendants filed July 23, 1954.

9. Plaintiffs' memorandum of points and authorities with attached exhibit in opposition to defendants' motion to dismiss and for summary judgment and in support of plaintiffs' motion for summary judgment filed August 27, 1954.

10. Defendants' objections to plaintiffs' request for admissions of B. L. Kennedy, Ford Q. Elvidge, Howard D. Porter and Richard Taitano filed August 26, 1954.

11. Reply to plaintiffs' request for admissions filed by B. L. Kennedy, Ford Q. Elvidge, Howard D. Porter and Richard Taitano on August 26, 1954.

12. Defendants' notice of hearing of objections to request of plaintiffs' for admissions filed August 26, 1954.

13. Reporter's transcript of proceedings had on August 27, 1954.

14. Opinion of the Court filed August 31, 1954.

15. Notice of appeal.

16. Order extending time to file record on appeal filed October 10, 1954.

17. Statement of points on appeal.

18. This designation.

19. The journal entries.

20. The minute entries.

21. All other motions and papers filed in this case.

22. The docket entries.

Dated at Agana, Guam this 26th day of November, 1954.

/s/ FINTON J. PHELAN, JR.,

/s/ E. R. CRAIN,

Attorneys for Plaintiffs-
Appellants

[Endorsed]: Filed November 27, 1954.

[Title of District Court and Cause.]

HEARING ON MOTIONS

Agana, Guam, August 27, 1954

Before the Honorable Paul D. Shriver, Judge.

The Court: Next order of business?

The Clerk: The matter of John Wilson, et al., vs. B. L. Kennedy, et al., hearing on motions.

The Court: Now what questions do we have here?

Mr. Otto: Your honor, if I may speak, the situation is that the defendants filed a motion to dismiss and for summary judgment on June 9. Subsequently the plaintiffs gave notice of a cross-motion for summary judgment and at the same time filed a request for admissions of fact and delivered them to counsel for each of the four defendants in the case. Defendants filed their answers to these requests yesterday, August 26, giving copies to counsel for plaintiffs and at the same time filed objections to certain requests for admissions of fact on

the ground that they are improper, so there are really three orders of business before the court as counsel for the defendants see it—the original motion by the defendants, the cross-motion by plaintiffs and the hearing on the objections.

The Court: Now you both have motions for summary judgment?

Mr. Phelan: (nods head) If it please the court, I believe the objections to requests for admissions should be disposed of first before the motions because those requests for admissions are to be considered with those motions.

The Court: Well, as I pointed out to you previously, I don't see where you have any dispute as to the factual situation. All of the requests for admissions and so forth are just window dressing. It has nothing whatever to do with the facts of the situation, which is this: You have Section 31. Section 31 either carries with it the enforcement machinery in the United States Code adaptable to collections in the continental United States or it doesn't. In your complaint you very clearly point out that these officials purported to act under that authority and that any money that they have collected they have collected for the benefit of the Territory of Guam and paid in. Now your position is that they are acting completely gratuitously, that they have no specific authorization either under the laws of the United States or under the laws of Guam to collect income tax.

Mr. Phelan: We claim they have no authority at all.

The Court: Yes, no authority at all. Now that is your position. The Government of Guam's position is that, by implication, the enforcement provisions in Title 26 of the United States Code become the law of the Territory of Guam, and that, under the affidavits which the officials have presented, they are the officials who are collecting that tax and the officials who are normally charged with that responsibility under the laws of the Territory of Guam. Now with that issue before you, what is there to argue about? It is purely a question of law.

Mr. Crain: If the court please, that is not the entire issue. They also take the stand that they can alter, amend, delete or add sections to the United States Revenue Code as they see fit.

The Court: Administratively.

Mr. Crain: Well, it seems to me they are legislating.

The Court: Yes, I say administratively they can make such alterations.

Mr. Crain: They can enforce it as they see fit so it isn't a matter of their taking the United States Internal Revenue Code and enforcing it as the Code of Guam.

The Court: What about this? Have you raised this question in any way that the court can decide it? You have brought an action here on behalf of two employers, two different employers, and two employees, not employees of the same employer, and you have said in effect that they were told that they had to withhold taxes, which they did, and the employees were told that those taxes had to be paid

into the Government of Guam, which was done, and that the officials had no authority whatever to tell them that or to collect the tax.

Mr. Phelan: Or to receive it.

The Court: Or to receive the tax, exactly. No question is presented in your pleadings that in the collection or the receipt of that tax anything was done which was contrary to Title 26 or was done pursuant to any change or assumption of authority here.

Mr. Phelan: I think otherwise, Judge, because we have claimed that they have no authority whatsoever under Title 26.

The Court: That is right. That is the ultimate fact, that they have no authority at all. The government claims that its authority is derived from Section 31, which carries with it Title 26 so far as is applicable.

Mr. Phelan: Section 31 brings into effect on this island Title 26. It contains no authority that I can find to change a word of it.

The Court: Well, that may be true, but that's what I am getting at, Mr. Phelan. You haven't shown that your particular complainants or plaintiffs have been affected by any changes made administratively outside the purview of 26.

Mr. Phelan: They have because in Title 26 they specify who has authority. Nowhere is the Government of Guam mentioned.

The Court: It seems to me the United States Treasury Department has construed Section 31 as establishing a territorial tax to be administered by

the officials of the Guam government and the United States supports that rule. The taxpayers have therefore complied with the instructions of both governments in meeting their tax liability and their tax has gone into the Treasury of Guam. They cannot now be heard to say that the tax should be returned to them in order that it be paid to the United States and returned to the Guam Treasury from which it was taken. The case of *Stone vs. White* disposes of any such contention. Now that, of course, is part of the overall opinion in the *Laguana* case but the Court of Appeals affirms this opinion for the reasons given in this opinion.

Mr. Phelan: Was not the basic reason that there wasn't any claim that relief be granted and wasn't that based on the fact that the parties stipulated?

The Court: It was based in part, of course, upon the fact that the proceeding was useless if the money had reached its proper repository.

Mr. Phelan: I can't follow that at all.

The Court: Well, now if you have a tax levy, which is your first point, and the tax, as you admit, was paid into some officials of Guam and was used by those officials in accordance with the requirements of Section 30, then how can anyone complain?

Mr. Phelan: Judge, can I go over to the post office in San Francisco and pay federal income tax to the postmaster?

The Court: You certainly could if Title 26 provided you should pay your tax into the postmaster.

Mr. Phelan: But it doesn't provide exactly who I should pay it to.

The Court: The Organic Act requires the Governor to enforce the laws of the United States.

Mr. Phelan: My contention is that the Organic Act and everything in it is a federal statute.

The Court: Yes, but how do you reach that point until you have a party who has been injured? How have your plaintiffs in any way been injured here?

Mr. Phelan: They have been injured here by the mere fact that a person not entitled to collect the tax has collected it.

The Court: But that is the very situation, the same general type of situation that the Supreme Court was passing on in the White case. In the White case you had precisely those facts. You had a person who had paid the tax, an inheritance tax, who wasn't liable for it, paid it as a trustee, and the court subsequently held that the tax should have been levied against the heirs and paid by them. The statute of limitations had run by that time as against the heirs. The Supreme Court said that in equity, since the government had gotten the tax, that it would not be heard to say that somebody should pay it back, that the government should pay it back to the trustees since the government was entitled to the tax.

Mr. Phelan: Well, is the Government of Guam entitled to a cent of this tax? Not as I read Title 26.

The Court: Well, what on earth does this language mean? As you know I had definite reservations as to the tax. Largely, of course, my view was much broader than yours. I felt that the tax was levied without the application of 251 regardless of

whether it was to be collected by the United States or whether it was to be collected by the Government of Guam and so held and then pointed out in this opinion that in my view, a view which I think has been substantiated by experience, that large amounts of revenue would escape in Guam due to a newly created government's difficulties in setting up adequate machinery for making effective collection. "Regardless of my initial view that Section 31 imposed a federal tax to be collected by the United States, I believe that I shall add to any existing confusion by persisting in that view in the light of the position taken by the government involved and my conviction that in any event a tax is imposed. I hold that the effect of Section 31 is to impose a territorial tax to be collected by the proper officials of the Government of Guam." Now if that isn't the situation in this case, I don't know what it could be.

Mr. Phelan: Where is the collection authority for these individuals? We are not suing the Government of Guam.

The Court: I would say the proper officials of the Government of Guam and these officials have made affidavits that they are the people who normally collect the taxes.

Mr. Phelan: We have asked the court to take judicial notice that nowhere is there authority to collect any tax except six sub-chapters in there.

The Court: In that case how can you complain? You have paid your tax.

Mr. Phelan: I want it back because the man who

got it can't give a valid receipt and he is not authorized to get it.

The Court: But that is precisely the case.

Mr. Phelan: In this White case you are citing, there is no question about the authority of the person who received the tax to receive the tax. There is here.

The Court: There is authority of the person to receive the tax from that particular person. In other words, it was a legal assessment against the trustees as I remember the case.

Mr. Phelan: Where in the Code of the Government of Guam is there any authority to assess a tax?

The Court: Well, now if the United States Congress levies a tax, somebody has to collect it. In this case it was said the federal government was not charged with the responsibility of collecting the tax and the Court of Appeals upheld that view. They said it was a territorial tax to be collected by the proper officials of the Government of Guam. Now that is finished business. The Supreme Court may overrule this case or reverse it, but that is the law so far as Guam is concerned. So far as the Court of Appeals is concerned the tax is levied to be collected by the proper officials of the Territory of Guam.

Mr. Phelan: Who are they?

The Court: According to the affidavits, the Government of Guam has set up a tax collecting system and that tax collecting system extends from the Governor to the Director of Finance through the

Collector of Internal Revenue appointed by the Government of Guam. Now the other question which I don't see how you can reach in this type of proceeding because if the Government of Guam is entitled to collect the tax and if it is collected properly, then the absence of appellate machinery or court of tax appeals, in so far as your client who is similarly situated is concerned, is immaterial. It might be material if they had withheld their tax for the reason that they had no method of litigating.

Mr. Crain: They didn't. They haven't paid all of their tax. They still owe the Government of Guam tax.

The Court: I thought your complaint stated amounts which were paid.

Mr. Crain: That amount had been paid in by withholding, but the Government of Guam is demanding more from all of them.

The Court: Well, that isn't before us now. That isn't set forth in your complaint.

Mr. Crain: Not in so many words. We did not make a statement.

The Court: No, you are dealing with a tax that has been collected.

Mr. Phelan: We did make a statement that they are demanding in these specific cases additional tax.

Mr. Crain: The Government of Guam admits that in their memorandum of points on motion.

Mr. Otto: Where did we admit that we are demanding anything?

Mr. Crain: In one of the documents you filed you stated defendants Wilson and White both owed

additional sums for 1953 to the Government of Guam, which had been demanded and which had not been paid.

The Court: Well, gentlemen, I am convinced that I am bound by the Laguana decision. I don't think I can go beyond that. I think the Court of Appeals has said that's the law. I don't think you can come in here in behalf of a taxpayer and ask for recovery unless you can demonstrate or allege that the tax was improperly assessed and why it was improperly assessed. You say that I can't go over and pay my tax to the postmaster in San Francisco, but I am quite certain that if I paid the postmaster in San Francisco, he would turn the money over to the Collector of Internal Revenue and credit it to my account and I cannot come in subsequently and say I want the money back because the postmaster had no right to take it.

Mr. Phelan: You wouldn't have a good receipt from the postmaster.

The Court: I would have a receipt when the government said "we credited your account." After all what is a receipt? It's evidence of payment. Who can recollect this tax from you? You mean to say that if the Director of Public Works, for instance, came in and said, "You paid the wrong people; you should have paid me," that you would not have a defense to his action by showing that the money reached the Government of Guam in connection with Section 30, as you have alleged, and due the Government of Guam?

Mr. Phelan: It would be illegally turned over to the Government of Guam.

The Court: It was turned over; it reached the final depositor.

Mr. Phelan: How do we know?

The Court: Because you have alleged it.

Mr. Phelan: We allege it was illegally turned over to the benefit of Guam. What right does a private individual have to set himself up as tax collector, whether he is the Governor or President. If the United States income laws are a part of the law of Guam, the Commissioner of Internal Revenue and various collectors are the individuals to collect the tax; other individuals cannot usurp that power.

The Court: Mr. Phelan, if I owed you \$50 and you said to some other client, "I wish Shriver would pay the \$50 he owes me," and that person said to me, "Why don't you pay the \$50 you owe him? Give it to me now and I will give him the \$50." Obviously I haven't paid you, but if he turns the \$50 over to you, you can't come back to me and say, "I never gave you a receipt for \$50. I received it but I didn't give you a receipt for it. It is still owing."

Mr. Phelan: That is true.

The Court: Now here you have alleged that whether the people were acting illegally or anything else that the money has reached the objective set forth in Section 30.

Mr. Phelan: But there is no authority. The Supreme Court case said despite the fact it went to the Treasury of the State of Massachusetts, they

had no right; it was a case of illegal collection beyond the scope of their authority.

The Court: Section 30 says that all of these taxes, including the federal income tax, "collected in Guam shall be covered into the Treasury of Guam and held in account for the Government of Guam, and shall be expended for the benefit and government of Guam in accordance with the annual budgets."

Mr. Phelan: Who covers and from whom? That is the serious question. Now the Government of Guam is not collecting custom duties. Some of these taxes, if collected, are collected in the States and transferred here. Does the man who collects draw a check and send it to the Government of Guam or does he send it to the United States Treasury? He sends it to the United States Treasury.

The Court: Sure because the law says that. I make my returns to the Collector of Internal Revenue in the States, but the law says that.

Mr. Phelan: The various fees in this court, your honor, go to the Government of Guam but the clerk of this court does not draw that check to the Government of Guam.

The Court: No, that is because the law provides what he should do with fees.

Mr. Phelan: The income tax law says who you will pay it to also. Nothing in Title 26 says where the ultimate money goes. Section 30 says it goes to the Government of Guam, but Section 30 can be read two different ways.

The Court: You haven't alleged here that you

have quitted your tax liability by paying it into the Treasury of the United States. In other words, you are taking the flat pragmatic position that nobody in Guam can collect a tax because the Guam Legislature has not set up, or the United States Congress, a specific method whereby the tax can be collected.

Mr. Phelan: They haven't authorized anybody to act as agent.

The Court: That despite the fact that the United States Congress said the money should be paid in. Under Section 30 the federal tax provisions provides for the levying of the tax. The Government of Guam is charged with carrying out the laws of the United States.

Mr. Phelan: It didn't make that stand up in Immigration.

The Court: Well, that is one thing, of course, we never found out.

Mr. Phelan: Immigration came out and took over.

The Court: They came out and took over but at least up to that point, the court held that he exercised residual responsibility.

Mr. Phelan: I have never been able to find that in any case—residual responsibility. The immigration laws did apply to Guam, the United States Immigration had the responsibility and that was authority for the Immigration people to come out here.

The Court: The United States income tax law and internal revenue law has for many years likewise applied to Guam. There is no absence of federal income tax on Guam. There is an exception if you meet certain things from that tax, but the tax itself is here. That question is moot. It is most *stari decisis*. The Laguana case has thrown that out the window. Now there is no use arguing with me how to construe Section 31. The Court of Appeals has said it's a territorial tax. The United States income tax laws do apply to Guam, and if a person does not come within that section, they still apply. Of course, the Government of Guam's theory is that they apply inversely, that the citizen of Guam who earns 80 per cent of his income in the United States is exempt from having to pay income tax in Guam.

Mr. Crain: They never have put that in writing, your honor.

The Court: Now I am not implying that I am happy with this present system or that I think the Government of Guam is relieved of responsibility for setting up adequate appellate procedures nor am I passing upon the question of Government of Guam administratively to do things which the Collector of Internal Revenue in the United States could not do, if that is true. I doubt very much whether they have such authority.

Mr. Phelan: I thought we would stipulate, but I never heard anything about the stipulation.

The Court: You have got to bear this in mind, too. In support of what I might call the elastic

point of view, if you had a counterpart of the collection system set up by the local legislature and if the income tax laws of the United States contemplate both the levying and enforcement procedures, we would have continuing confusion every time the United States government changed the United States income tax laws, unless they are self-enforcing.

Mr. Phelan: The statute says the present income tax laws and those which may hereafter be enacted.

The Court: Exactly, that is what I say and those undoubtedly control and under that set-up what would you be doing if the United States, for instance, granted exemptions in excess of those which were in existence when the government of Guam set up its machinery? You would immediately say, "Now, we are entitled to this." The Government of Guam would say, "We are bound by our own law, which you argued back in 1954."

Mr. Phelan: It is an administrative procedure. If they would hold that the change in the statute wasn't to be applied by that administrative section, they would be legislating on tax, not on procedure.

The Court: Well, what I originally started out to try and do this morning was to try to get you people to stipulate as to the facts.

Mr. Phelan: I hoped in 30 days to get an opportunity to, but I never got an opportunity.

Mr. Otto: I spoke twice to Mr. Crain and we were ready and willing to confer with opposing counsel at any time. The first day was on the oc-

occasion of the previous hearing and the second occasion was about ten days ago.

The Court: I think the facts are very simple. In other words, the Government of Guam has admitted nearly everything that you have asked for so far as the factual situation is concerned, but you are asking for conclusions of law.

Mr. Phelan: They may also be facts, Judge. What objection can anybody legitimately have to anybody saying this section we are using that the text has not been changed. That is not a conclusion of law; that is a fact.

The Court: That is merely captious. You have access to the United States Code, Section 26.

Mr. Phelan: True, they claim it has been changed. If there is no change, we know exactly.

The Court: All I know is public repute. At least the Congress modified the income tax law, reducing taxes by about ten per cent in the United States. Those reductions were made effective in Guam and as other changes or exemptions are made, the Government of Guam makes them effective in Guam.

Mr. Phelan: I am not talking about that. They say they have made certain changes in the text of the statute. They have claimed that right. If that is not so, let them say so. Let us know that when we take down the United States Code, annotated, that is the section they are talking about.

The Court: What they say is there are certain provisions in the Code of the Government of Guam for adapting the Code of the United States.

Mr. Crain: They say much more than that, your

honor. Mr. Ootto says the right of the appellant to appeal to the United States tax court is not necessary. Now if that isn't a change in the text of the law, I don't know what is. He sets himself up as all of the things that the Internal Revenue Bureau does by law in the States.

The Court: Well, of course, you are getting then in the field of due process of law, which is not before me in this case. You don't say it wasn't levied—if the territorial tax is valid, you don't say it wasn't levied in the Territory of Guam and paid in. Now these matters that you point out here I, of course, am equally surprised that the Government of Guam long before this has not set up a system whereby the taxpayers are given the same rights they would have in the United States, but that isn't before me; for as you recall in the Crain case, it seems to me, that the Court of Appeals went to considerable pains to point out that they weren't passing upon something which had not been raised in the case, as well as the obligation of the collector of the treasury here, in common law, to repay any money which has been illegally collected. From the very citations of their cases I think they want us to be on notice that the collector, pursuant to common law, is liable for any tax illegally assessed or collected, but that isn't your case.

Mr. Phelan: We have a file about that thick. It could be down to about six pages if the conference that was supposed to have been had had occurred. A lot of this would not be necessary and the ques-

tion probably could be in all respects resolved once and for all.

The Court: Now let me ask these questions of the Government of Guam: You have no tax collecting legislation specifically affecting income tax?

Mr. Otto: No legislation by the Government of Guam Legislature specifically directing a department or agency to collect the income tax, as provided under Section 31. However, of course, the Legislature, for example, has appropriated sums of money for the Department of Finance which includes the sums necessary to operate the necessary position of the Commissioner of Internal Revenue and other employees.

The Court: The Government of Guam has not specifically enacted any statutory legislation authorizing any particular official to collect income tax. Now that is a fact?

Mr. Rosenberry: Yes, sir.

The Court: The machinery which you are now using to collect the income tax has been set up by administrative order?

Mr. Otto: It has been set up by the Government of Guam by directive from the Governor to the Department of Finance. I wouldn't say there has been an executive order though.

The Court: You have set up this machinery by direction of the Governor, that income taxes shall be collected through those methods and by that agency which collects other taxes?

Mr. Otto: That is correct, your honor.

Mr. Phelan: Is that in writing?

The Court: That carries with it a modification in that you have an administrative employee whom you call the Collector of Internal Revenue?

Mr. Otto: Yes—no, Commissioner of Revenue and Taxation.

The Court: Is he involved with anything other than income tax?

Mr. Otto: Yes, your honor, he is involved with other taxes.

The Court: Very well. Commissioner of Revenue and Taxation.

Mr. Phelan: If I am not mistaken, if your honor please, the section of the code that sets up that title restricts it to privilege tax.

The Court: You do not have any statutory method for taking an appeal from the rulings of the Commissioner of Revenue and Taxation?

Mr. Otto: The Legislature of the Government of Guam has not set up any formal procedure and the Governor of Guam, as head of the executive department, has not established any formal tax court, but for that matter, which is mentioned also in Mr. Crain's affidavit, it may be pointed out that whether or not the United States tax court is available to hear appeals from decisions of the Commissioner of Revenue and Taxation and to assess them is a matter that is a conclusion of law to be decided, presumably, by some court and any statements made by myself, for instance, are mere matters of opinion.

The Court: Well, what I am saying is what you haven't done. Now that isn't a matter of opinion.

Mr. Otto: No, sir.

The Court: That is what I said at the outset and neither the Legislature nor the Governor of Guam has established a method of appeal from the rulings of the Commissioner of Revenue and Taxation?

Mr. Otto: That is correct, sir, there is no method established whereby the rulings of the Commissioner of Revenue and Taxation could be reversed by an official of the Government of Guam.

The Court: What do you expect the taxpayer to do if he sincerely feels that the commissioner has acted wrongfully?

Mr. Otto: Our position is that the taxpayer can pay the tax and sue for a refund. We feel that is very clear and the second point is one that I mentioned before. It is not impossible that the United States tax court would not take it.

The Court: Do you have any procedure for holding that tax in trust until the matter is determined?

Mr. Otto: No such procedure has been established to hold it in trust.

The Court: Do you think for one moment that the Government of Guam would be in any position to repay taxes paid under protest to the extent roughly of a million dollars?

Mr. Otto: Well, of course, that is not the issue in the case, your honor. However, the Government of Guam has refunded thousands upon thousands of dollars without resort to court procedure.

The Court: You deny the taxpayer the right to file a return in good faith and to contend that no

tax is owing, get a ruling from the Commissioner of Internal Revenue, and then have no place else to go? It stops there?

Mr. Otto: Well, we don't necessarily deny that. We say that further proceedings in a tax court are possible. We don't know what court.

Mr. Crain: If the court please, by their own admission, the tax court of the United States becomes the tax court of Guam by Title 26, so I don't see where Mr. Otto's argument stands up there.

The Court: Well, I don't think anybody would question but that that type of procedure is not in compliance with Section 31.

Mr. Phelan: I doubt that the tax court would take jurisdiction of the question.

The Court: But that is not before me. The only time it comes before me is when somebody wants to use that machinery and it doesn't exist. In other words, I am not at this time required to pass upon the question as to whether the Government of Guam can substitute an arbitrary administrative opinion for a judicial opinion, which the Congress of the United States authorizes and requires in connection with collections in the United States. It seems to me that is a question which has to be raised at the proper time and proper proceedings.

Mr. Phelan: We could add an amendment to this complaint.

The Court: I have to take this complaint as it is. I have a motion for summary judgment before me. I have got your motion for summary judgment. You are through on this complaint.

Mr. Phelan: I believe that summary judgment, if a single contraverted fact and——

The Court: It is not a contraverted fact; it is a contraverted question of law. What I am trying to say throughout—you are agreed as to the facts. You have never had any disagreement. The question is solely one of law. What fact are you going to disagree on?

Mr. Crain: The authority of the four defendants to collect taxes.

The Court: That is a question of law; it is not a question of fact. They freely tell you that they have no statutory, local statutory authority, that they are acting under the implied authority of Section 31.

Mr. Crain: Well, that isn't correct either entirely. Through their arguments they say that they do have statutory authority and that it is Title 26.

The Court: Yes, they say Title 26 is applicable to them. Is that so unusual? Do you think the Congress of the United States would create a vacuum, levy a tax and say nobody is entitled to collect it?

Mr. Phelan: Well, as I understand it, the Commissioner of Internal Revenue is nominated by the President and confirmed by the Senate. Was Mr. Kennedy nominated by the President and confirmed by the Senate?

The Court: What difference does that make as long as you have admitted that the money has gone to the Government of Guam? If the tax was levied and if it was received by the Government of Guam, which is admittedly the case, how can you come in

and say that it was received by someone who had no right to act?

Mr. Phelan: Does that not violate due process?

The Court: No.

Mr. Phelan: Then if I——

The Court: But you are dealing here with an accomplished fact. That tax has been paid. Now you don't think the law is going to say "You give that money back to us and let us pay it to somebody else to pay in and be used by the Government of Guam?"

Mr. Phelan: I am not asking the Government of Guam for anything. I am asking individuals to give back what they had no right to take.

The Court: Then you are reaching the question of the validity of the tax itself.

Mr. Phelan: No, these individuals.

The Court: Well, I don't think we are going to get very far on that.

Mr. Phelan: If I paid my federal income tax to the City of New York instead of to the Collector of Internal Revenue, for instance, I could get it back.

The Court: But if you turned it in to the Collector of New York and he paid it over to the proper authorities——

Mr. Phelan: I mean the tax collector of the City of New York.

The Court: Yes, if he paid it over to the proper authorities and you were given credit for the payment of that tax, I don't think you can come into court and get it back.

Mr. Phelan: He had no right to take it. I think I could recover under common law.

The Court: Not unless you have been damaged. What injury have you suffered under your complaint? If you have a territorial tax and if it is to be collected by proper officials of the Government of Guam and if the tax was levied and if it was paid in by your plaintiffs and if it was used for the benefit of the Government of Guam, in what way have they been prejudiced? What relief could this court possibly give?

Mr. Phelan: Well, I would say this—if I were appointed as tax collector of a federal tax collection district in Guam, I would demand an accounting of all taxes.

The Court: Your position on that, of course, is the position of the plaintiff in the Laguana case. You are still talking about a federal income tax. The courts have now held that it is a territorial tax levied by the United States Congress.

Mr. Phelan: Is it a federal statute or a local statute?

The Court: It's a federal statute applicable locally. The Supreme Court has held many times that it's the responsibility of the United States Congress to legislate for its territories. It is not necessarily bound by the same constitutional restrictions which apply to legislation for the States.

Mr. Phelan: That is true.

The Court: They could make a greater tax here; they could make a lesser tax. They could do what-

ever they wanted. What they have done, according to these opinions, is to create a parallel tax.

Mr. Phelan: We can say the law is found in the United States statute and not the Code of Guam.

The Court: The tax is levied as found in the Organic Act of Guam and the income tax laws, if construed as including enforcement as well as levying, are set forth in Title 26.

Mr. Phelan: In view of the case of *Johnson vs. United States*, must we not then construe those in the light of the constructions of the federal courts of the United States under Title 26?

The Court: Well, of course, you can't draw a conclusion as to something that isn't before the court, but ordinarily any Act of Congress is construed in the light of the applicable federal decisions. There isn't any doubt about that. Nowhere have we in any of these cases cited anything but federal decisions.

Mr. Phelan: Then on this territorial income tax the canons of construction are United States decisions interpreting Title 26 of the United States Code?

The Court: In the applicable situation.

Mr. Phelan: Then actually there can be no change in the tax.

The Court: It seems to me that the court in the *Crain* case, which was repeated in the *Laguana* case, has established the basic criteria to determine whether or not you have a cause of action. That basic criteria is that the court held that taxpayers in Guam are required to pay their tax on exactly

the same basis and measured in the same amount that they would have to pay in the continental United States. Now that is, I think, your proper criteria under Section 31. I don't think you can complain if that tax is paid to the Government of Guam and reaches its eventual resting place, which is the Guam Treasury, unless you can show that you are being required to do something or pay something which is not required if you are residing in the continental United States; not who you pay but what you pay.

Mr. Phelan: Is it not a fact that a man not authorized to do something can be kept from doing that even though the proper official can do it?

The Court: If a person is going to be injured, certainly.

Mr. Phelan: What has injury got to do with it?

The Court: Well, you don't have that question before me. Your tax has been paid.

Mr. Phelan: We are also asking that they be stopped from attempting to collect it.

The Court: Yes, but you haven't shown any damage there.

Mr. Phelan: You have shown damage if the wrong man is trying to collect it.

The Court: If you admit what you say is the wrong man as the man who has paid it into its eventual resting place, where is the damage?

Mr. Phelan: Then anybody who appears to collect a debt from any person and if it gets to the creditor, it is all right?

The Court: Now you have two portions to the

motion. You have, of course, moved for summary judgment on the admissions. You have moved first to dismiss upon the ground of lack of jurisdiction. I don't feel that in the light of the Crain case, that on the fact of their complaint, a motion to dismiss is valid because you are unable to cite statutory authority of which the court can take judicial notice which sets the particular individuals up as being qualified to collect this tax. You have to supplement that as you have by your motion for summary judgment, so the court on the motion to dismiss does not have before it all the factors which would be essential. You have filed your motion for summary judgment as the plaintiffs have. I think I have enough before me to pass upon that motion for summary judgment. Now as to all of these questions—I, of course, read the questions in the beginning. I do not agree with the plaintiffs, the nature of the questions or that they are proper. I think the question is purely one of law, and I think that any questions have been answered by the affidavit in support of the motion for summary judgment. I think it is ridiculous for plaintiffs to say that Ford Q. Elvidge is not Governor of Guam, Howard Porter is not the Attorney General, or that Taitano is not the Director of Finance.

Mr. Phelan: There is no question about that.

The Court: And they have further said in their affidavits who did collect the tax. There is no question that they got the money?

Mr. Phelan: No question that they got the money.

The Court: Your question is a matter of law, a law that they had any authority to get the money. Now that is a question of law; it is not a question of fact so all these questions which relate to whether Title 26—in other words, the Government of Guam could say it doesn't apply or anything else and it would still wind up in this court and the court could ignore this question. The answers are not binding on this court as they would be if you had a strictly factual situation. It is a legal situation, so I think you had better let me take this under advisement and get to work on an opinion. Do you think of anything else that I should have? I will overrule your motion to dismiss. On the face of it, the motion is not an action against the Government of Guam. The motion for summary judgment, of course, is. Do you think of anything else I should have?

Mr. Phelan: You have got the whole file.

The Court: I can't see that you have a question here except whether or not Section 31 carries with it the authority on the part of the Government of Guam to use the counterpart of the enforcement machinery of the United States.

Mr. Phelan: Well, we have also raised a question of due process.

The Court: Well, I don't see how you can complain about due process when you haven't reached the point where you need it. That is like saying "I don't have to plead to an offense in this court because I don't like the way or I don't think the Supreme Court of the United States is legally con-

stituted." When you get to the Supreme Court you are not concerned with whether or not that is the authority. It may never get there. The Collector of Internal Revenue, I presume, disposes of 95 per cent of the objections which are raised.

Mr. Phelan: As I see it, due process of law means regular procedure according to law.

The Court: Now I can readily see that you would have to file a return and if the collector ruled against you and you wanted to appeal under the rights which are set up in the United States and the collector said, "No, we are going to assess and we are going to levy," I think I can readily see where you might be able to come into this court and enjoin him or something of that kind, but you have got to have the situation.

Mr. Phelan: Well, isn't it a fact that there is definitely a question of due process of law?

The Court: I don't think the Government of Guam can slam the door in the face of taxpayers by administrative action without giving them the right to the same process that we have elsewhere. They can't say "We want all of the benefits but accept none of the liabilities," and I don't think they are trying to do that.

Mr. Crain: That I don't agree with you. Mr. Phelan and I feel my affidavit would carry as much weight as Governor Elvidge's, and I say they did that—slammed the door and denied the right.

The Court: But you didn't say these taxpayers lost anything.

Mr. Crain: I said that these taxpayers were

being forced to pay \$624 to the Government of Guam without any recourse beyond the Attorney General's office.

The Court: You don't say that that \$624 was improperly levied.

Mr. Phelan: There is the question of due process and it is a question of whether it was properly levied.

Mr. Crain: And we have no place to go to find out.

The Court: But that is not your plea. Nowhere do I find in the pleadings that you have alleged that if the taxpayer resided, both the employer and employee, in the United States that that tax was not proper.

Mr. Phelan: This is the affidavit of one, not one of the named plaintiffs. With respect to the person——

The Court: I think that has to be raised in the proper action. I think all you have raised here is the authority of the Government of Guam to act under Section 31. In other words, the position the Government of Guam takes is that the right to enforce is implicit in the authority vested under Section 31. I almost forgot—you are doing the same thing, of course, here that you did in the Laguana case. Long after Ansell had ceased to have an official position in the Government of Guam, Ansell was a party to the action. Now Kennedy is gone. He is no longer the collector and neither one of you has moved to make the new collector the party.

Mr. Crain: The new collector didn't collect any of the things we are talking about here.

The Court: You are asking for a class judgment. In other words, if you got a judgment against Kennedy, it wouldn't be valid on the present collector.

Mr. Phelan: No, it would be a personal judgment.

The Court: Yes, it would have to be.

Mr. Phelan: There is no relief requested against the Government of Guam.

The Court: Well, if you are going to reach your eventual objective, the court, of course, has to hold—no doubt in my mind on that—I have to hold that you are suing the Governor of Guam and the other officials in their official capacities. Now I think you won't for a moment get away with the fiction that you are dealing with mere interlopers in this government. You are not. You are dealing with the regularly appointed officials and you can't deny that.

Mr. Phelan: But the mere fact that a man is an official——

The Court: So you are suing them in their official capacities.

Mr. Phelan: I deny that.

The Court: You certainly aren't suing them for any matter which they are not doing in their official capacities.

Mr. Phelan: Yes. I say it's beyond their scope. I have cited several Supreme Court cases on that

point where officials were sued for acting beyond the scope of their authority.

The Court: Exactly, but you have just agreed with me when you say "officials were sued." That is what I am saying, "officials," not as individuals.

Mr. Phelan: Officials acting as individuals. There is one involving the State of Georgia about two years ago.

The Court: Now, I will take this matter under advisement and I will prepare a written opinion and will rule on the question of summary judgment since both of you have moved for summary judgment. I think the issue is still a bit more confused than it would have been if you had done what I consider the logical thing and that is reduce all questions to stipulations 1, 2, 3, where you wouldn't have any doubt left, but I think I can dispose of the matter on the summary judgment. Any further business?

The Clerk: No other matters, your honor.

The Court: The court will stand adjourned until further notice.

(The court adjourned at 11:10 a.m., August 27, 1954.)

[Endorsed]: Filed November 27, 1954.

[Title of District Court and Cause.]

ORDER

Upon request of the Clerk of the Court and good cause appearing therefor:

It Is Ordered that the Clerk of the Court shall have until and including December 9, 1954, in which to file and docket the record on appeal in the within captioned case.

Dated November 29, 1954, at Agana, Guam.

/s/ PAUL D. SHRIVER,
United States Judge for the
District Court of Guam

[Endorsed]: Filed November 29, 1954.

[Title of District Court and Cause.]

JOURNAL ENTRIES AND MINUTES

1954

- 6-10—Notice and Motion to Dismiss and for entry of Summary Judgment having been filed by defendants—Kennedy, Elvidge, Porter and Taitano, Ordered hearing set for Friday, July 30, 1954, at 9:30 a.m.
- 7-20—Notice and Cross-Motion for Summary Judgment having been filed by the plaintiffs, Ordered hearing set for Friday, July 30, 1954, at 9:30 a.m.

1954

7-23—Motion and Notice of motion for extension of time having been filed by the attorneys for the defendants, Ordered hearing on said motion set for Tuesday, July 27, 1954, at 8:30 a.m. in Judge's Chambers.

7-27—Hearing: Attorneys present. After hearing arguments of attorneys, Ordered that defendants have until August 26, 1954, in which to file answers or objections. Hearings set for July 30, 1954, continued to August 27, 1954 at 9:30 a.m.

8-27—Hearing: Plaintiffs appearing by E. R. Crain and Finton J. Phelan, Jr., their attorneys. Defendants appearances by Louis A Otto, Jr., and Richard Rosenberry, their attorneys. Having heard the arguments of the attorneys for the respective parties, Court overrules defendants motion to dismiss and takes under advisement the plaintiffs' and the defendants' motions for Summary Judgment. Court will prepare and file written Opinion and Orders.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Roland A. Gillette, Clerk of the District Court of Guam for the Territory of Guam, M. I., do hereby certify that the following documents, to wit:

1. Complaint—filed April 30, 1954.

2. Order granting extension of time—filed May 14, 1954.

3. Motion with supporting documents — filed June 9, 1954.

4. Notice of Motion—filed June 10, 1954.

5. Requests for Admission of Facts—served on all defendants on July 19, 1954—filed July 20, 1954.

6. Plaintiffs' Notice of Motion for Summary Judgment—filed July 20, 1954.

7. Affidavit of service of Request for Admissions —filed July 20, 1954.

8. Affidavit of service of Notice of Motion—filed July 20, 1954.

9. Defendants' Motion for extension of time—filed July 23, 1954.

10. Notice of Motion—filed July 26, 1954.

11. Order for Hearing on Motion—filed July 26, 1954.

12. Affidavit of service on E. R. Crain—filed July 26, 1954.

13. Affidavit of service on F. J. Phelan—filed July 26, 1954.

14. Order on Motion for Continuance—filed July 27, 1954.

15. Affidavit of E. R. Crain with Exhibit "A"—filed August 26, 1954.

16. Plaintiffs' Memorandum of Points and Authorities in opposition—filed August 27, 1954.

17. Objections of defendant — Kennedy — filed August 26, 1954.

18. Objections of defendant—Elvidge—filed August 26, 1954.

19. Objections of defendant—Porter—filed August 26, 1954.

20. Objections of defendant—Taitano—filed August 26, 1954.

21. Reply of defendant Kennedy—filed August 26, 1954.

22. Reply of defendant Elvidge—filed August 26, 1954.

23. Reply of defendant Porter—filed August 26, 1954.

24. Reply of defendant Taitano—filed August 26, 1954.

25. Affidavit of Service on E. R. Crain—filed August 27, 1954.

26. Affidavit of Service on F. J. Phelan—filed August 27, 1954.

27. Motion of Hearing Defendants Objections—filed August 26, 1954.

28. Opinion—filed August 31, 1954.

29. Notice of Appeal—filed September 20, 1954.

30. Bond for Costs on Appeal—filed September 20, 1954.

31. Order of court extending time—filed October 19, 1954.

32. Statement of Points on Appeal—filed November 27, 1954.

33. Designation of Contents of Record on Appeal—filed November 27, 1954.

34. Court Reporter's Transcript of Proceedings—filed November 27, 1954.

35. Order of Court extending time—filed November 29, 1954.

36. Journal entries and Minutes of proceedings in open Court.

are the original documents filed in the office of the clerk of this court in the above entitled case.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of the aforesaid court at Agana, Guam, M. I., this 2nd day of December, A.D. 1954.

[Seal] /s/ ROLAND A. GILLETTE,
Clerk of the Court

[Endorsed]: No. 14593. United States Court of Appeals for the Ninth Circuit. John Wilson, Leonard White, Paul Bogovich and Elizabeth Tintorri, Appellants, vs. B. L. Kennedy, Ford Q. Elvidge, Howard D. Porter and Richard Taitano, Appellees. Transcript of Record. Appeal from the District Court of Guam, Territory of Guam.

Filed: December 7, 1954.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14593

JOHN WILSON, LEONARD WHITE, PAUL
BOGOVICH, and ELIZABETH TINTORRI,
Plaintiffs-Appellants,

vs.

B. L. KENNEDY, FORD Q. ELVIDGE, HOW-
ARD D. PORTER, and RICHARD TAITANO,
Defendants-Appellees.

ADOPTION OF STATEMENT OF POINTS
REQUIRED BY RULE 75(d) PREVIOUSLY
FILED

The appellants hereby adopt the statement of
points filed with the designation of record in this
cause on 27th day of November, 1954.

Dated at Agana, Guam, this 20th day of Decem-
ber, 1954.

/s/ FINTON J. PHELAN, JR.,
/s/ E. R. CRAIN,
Attorneys for Appellants

[Endorsed]: Filed December 23, 1954. Paul P.
O'Brien, Clerk.

No. 14,593

IN THE

United States Court of Appeals
For the Ninth Circuit

JOHN WILSON, LEONARD WHITE, PAUL
BOGOVICH, and ELIZABETH TINTORRI,
Appellants,

VS.

B. L. KENNEDY, FORD Q. ELVIDGE,
HOWARD D. PORTER, and RICHARD
TATTANO,
Appellees.

On Appeal from the District Court of Guam for the
Unincorporated Territory of Guam.

APPELLANTS' OPENING BRIEF.

FINTON J. PHELAN, JR.,
Suite 201-203, Mesa Building,
First Street West, Agaña, Guam,
Attorney for Appellants.

FILED

APR 20 1955

PAUL P. O'BRIEN, CLERK

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No. 14,593

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JOHN WILSON, LEONARD WHITE, PAUL
BOGOVICH, and ELIZABETH TINTORRI,
Appellants,

VS.

B. L. KENNEDY, FORD Q. ELVIDGE,
HOWARD D. PORTER, and RICHARD
TAITANO,
Appellees.

On Appeal from the District Court of Guam for the
Unincorporated Territory of Guam.

APPELLANTS' OPENING BRIEF.

JURISDICTION.

This is an appeal from a final order and judgment of the District Court of Guam entered on the 31st day of August, 1954 dismissing the complaint, denying the plaintiffs' motion for summary judgment and entering summary judgment in favor of the defendants. Jurisdiction to hear this appeal is in this court by virtue of Section 1291 Title 28 U.S.C.A. This action arises under the Revenue Laws of the United States and seeks the construction of Chapter 8A Title 48 U.S.C.A.

STATEMENT OF THE CASE AND QUESTIONS PRESENTED.

This case is one wherein the plaintiffs, herein appellants, are seeking the construction of a Statute of the United States, namely Chapter 8A of Title 48 U.S.C.A. commonly known as the "Organic Act of Guam".

Plaintiffs Wilson and White are United States citizens, who have been residents of the unincorporated territory of Guam for several years while employed by Brown-Pacific-Maxon, a joint-adventure performing construction work for the United States under contract with the Department of the Navy. Wilson and White are not employees of the United States. Plaintiffs Bogovich and Tintorri are citizens of the United States, residents of the unincorporated territory of Guam, who in partnership own and operate a prominent restaurant and cocktail lounge. In the operation of this partnership, they have employed numerous individuals.

The defendants are respectively B. L. Kennedy, from sometime in 1953 until a date subsequent to the commencement of this action an employee of the Government of Guam in the Department of Finance, titled under the Business Privilege Tax Provisions of Chapter XX of the Government Code of Guam, Commissioner of Revenue and Taxation; defendant Elvidge has, since the year 1953 to the present been the Governor of Guam; defendant Porter, for this same period, has been the Attorney General of the unincorporated territory of Guam; defendant Taitano

has, since the year 1952, to the present, been the Director of Finance of the Government of Guam.

Since the year 1951, officials of the Government of Guam have construed the Organic Act of Guam to contain in a one sentence section, the entire text of Title 26 U.S.C.A., insofar as such title refers to and concerns income taxes, which section further is claimed by such officials to create within Guam a counterpart tax structure and system, similar to the Bureau of Internal Revenue of the United States, with the right, power, and authority to apply, enforce and administer the provisions of Title 26 U.S.C.A. as a territorial tax for the benefit of the Government of Guam. These same officials have claimed to, and in actual practice do, interpret, alter, substitute words and make such alterations in the text of the Statute, claimed to exist locally, as in their discretion they from time to time deem advisable, necessary or expedient. A few interpretations, alterations and substitutions have been made by the publication of regulations. The vast majority, however, have been the oral opinions of various employees given from time to time to meet the exigencies then to be faced and, of course, no record ever is maintained.

Acting upon this contention of the various Government officials, the oral instructions of the Governor, the, it must be assumed, advice of the Attorney General, the Director of Finance, through his subordinates, charged by Statute with the duty of col-

lecting the territorial Business Privilege Tax proceeded to create a staff and organization, similar, it is claimed, to that of a Collector of Internal Revenue of the United States. All the authority and power of the Secretary of the Treasury, of the Commissioners of Internal Revenue and of a District Director of Internal Revenue were assumed and locally exercised, certain steps or functions being omitted, however. Thus, no Tax Court exists, no appellate procedure is found, no technical staff provided. The text of this claimed territorial tax law has never been published and cannot be found and further, any changes claimed to have been of necessity made in the text of Title 26 U.S.C.A. have never been published, thus rendering as a practical matter it extremely difficult if not impossible to use the United States Statute as a guide.

Nevertheless, these defendants and other officers and employees of Guam have proceeded to demand, collect, and receive taxes from citizens of Guam, to publish forms, to assess penalties, to attach, levy, seize funds and property, file Guam tax liens, and issue Warrants of Distrainment, and institute suits both civil and criminal.

Plaintiffs Wilson and White, along with their fellow employees, and without their permission, had withheld from their pay various but substantial sums by their employer, Brown-Pacific-Maxon, upon the demand of the defendants and such sums were thereafter paid over to the defendants or to some of them. Such withholding continues to the present. Further,

the defendants continue to claim and demand additional sums and continued withholding.

Plaintiffs Bogovich and Tintorri have been coerced, under threats of penalties and other sanctions, to withhold from their various employees large sums of money and pay the same over to defendants.

Plaintiffs Wilson and White brought this action to recover monies illegally obtained and to have determined the existence of the alleged separate territorial tax, the authority, if any, of the defendants to collect such a tax, if any, and to enjoin the defendants from illegally exacting a tax and doing other illegal acts.

Plaintiffs Bogovich and Tintorri joined in this action, their claim involving common questions of law, seeking the same determination and relief sought by Wilson and White and to have the monies illegally coerced from them paid over to their employees, rightfully entitled thereto.

The defendants, appearing by the Attorney General and his staff, moved for dismissal on the grounds of lack of jurisdiction over the subject matter and for failure to state a claim, also for summary judgment.

Plaintiffs had served, pursuant to Rule 36, requests for admission of facts, upon each defendant, seeking to determine the text of the alleged territorial income tax, the nonexistence of any territorial legislation implementing the same, the lack of local statutory authority to permit enforcement, administration or collection of income tax by defendants, the lack of any delegation of authority by the Secretary

of the Treasury or the Commissioner of Internal Revenue, that defendants are not attempting to enforce a United States tax or collect a tax on behalf of the United States, and the existence or lack of appellate procedure provided by the United States for Federal taxpayers. These requests were in detail to permit, insofar as possible, either direct admission or denial by each defendant of the majority of the statements or for him to state that he personally could not answer that statement. Thus plaintiffs endeavored to clearly set forth the factual background and circumstance of the action. The defendants answered and objected to the majority of the requests; in fact defendant Kennedy's answer was not verified by him but by defendant Taitano.

Nothing was accomplished, however, since the District Court did not consider these requests for admission and apparently believes that the rule does not have to be followed in such an instance.

Upon hearing, the defendants' motion to dismiss the complaint was granted and thereafter the District Court of Guam entered summary judgment for the defendants. This appeal followed raising numerous points of error. However, since these claimed errors fall into several related categories it is believed that in the interest of clarity and convenience they should better be considered and discussed by category rather than a separate and disjointed discussion of each, error. This method has been adopted in this brief.

The questions presented herein basically are set forth as follows:

1. Whether the court was in error in dismissing the complaint, entering summary judgment for the defendants rather than the plaintiffs, after deciding issues of fact upon affidavits filed to support a motion.

2. Whether the court erred in entering summary judgment in favor of defendant Kennedy.

3. Did the court err in holding that no controverted question of fact existed.

4. Was the court in error in holding that all requests for admission were not as a matter of law admitted.

5. Did the court err in not considering admission of defendants' counsel in open court and in holding that the defendants have authority to collect income taxes, supporting this position by the authority of IT. 4046.

6. Were the defendants sued in their official capacities.

7. Did the court erroneously construe the Organic Act of Guam and the *Laguana* case.

8. Did the court err in holding that the income tax laws of the United States are territorial income tax laws subject to changes in nomenclature.

9. Did the court fail to see major constitutional questions in the case.

10. Did the court err in failing to comply with the Federal Rules of Civil Procedure and not requiring defendants to also comply.

STATUTES AND RULES INVOLVED.Title 26 *U.S.C.A.*

Section 53.

Time and place for filing returns.

(b) To whom return made.

(1) Individuals. Returns (other than corporation returns) shall be made to the collector for the district in which is located the legal residence or principal place of business of the person making the return, or, if he has no legal residence or principal place of business in the United States, then to the collector at Baltimore, Maryland.

(2) Corporations. Returns of corporations shall be made to the collector of the district in which is located the principal place of business or principal office or agency of the corporation, or, if it has no principal place of business or principal office or agency in the United States, then to the Collector at Baltimore, Maryland. 53 Stat. 28.

Section 62.

Rules and regulations.

The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this chapter. 53 Stat. 32.

Section 272.

Procedure in general.

((a)(1) Petition to the Tax Court of the United States.) If in the case of any taxpayer, the Commissioner determines that there is a de-

iciency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail.

Section 273.

Jeopardy assessments.

(a) Authority for making. If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

Section 291.

Failure to file return.

(a) In case of any failure to make and file return required by this chapter, within the time prescribed by the Commissioner in pursuance of law, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the tax:

Section 1621.

Definitions. As used in this subchapter.

(a) Wages. The term "wages" means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include remuneration paid—

... (8) ... (B) for services for an employer (other than the United States or any agency thereof) performed by a citizen of the United States within a possession of the United States (other than Puerto Rico), if it is reasonable to believe that at least 80 per centum of the remuneration to be paid to the employee by such employer during the calendar year will be for such services, ...

Section 3650.

Collection districts.

(a) Establishment and alteration. For the purpose of assessing, levying, and collecting the taxes provided by the internal revenue laws, the president may establish convenient collection districts, and may from time to time alter said districts.

(b) Number. The whole number of collection districts for the collection of internal revenue shall not exceed 65.

(c) Boundaries.

(1) Hawaii. The Territory of Hawaii shall constitute a district for the collection of the internal revenue of the United States, with a collector, whose office shall be at Honolulu, and deputy collectors at such other places in the several islands as the Secretary shall direct.

(2) Elsewhere. For the purpose mentioned in subsection (a), the President may subdivide any State, Territory, or the District of Columbia, or may unite two or more States or Territories into one district. 53 Stat. 445.

Section 3670.

Property subject to lien.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. 53 Stat. 448.

Section 3743.

Regulations.

It shall be the duty of the Commissioner, with the approval of the Secretary, to establish such regulations, not inconsistent with law, for the observance of revenue officers, respecting suits arising under the internal revenue laws in which the United States is a party, as may be deemed necessary for the just responsibility of those officers and the prompt collection of all revenues and debts due and accruing to the United States under such laws. 53 Stat. 460.

Section 3760.

Closing agreements.

(a) Authorization. The Commissioner (or any officer or employee of the Bureau of Internal Revenue, including the field service, authorized in writing by the Commissioner) is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in re-

spect of any internal revenue tax for any taxable period.

(b) Finality. If such agreement is approved by the Secretary, the Under Secretary, or an Assistant Secretary, within such time as may be stated in such agreement, or later agreed to, such agreement shall be final and conclusive, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact—

(1) The case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of the United States, and

(2) In any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded. 53 Stat. 462.

Section 3791.

Rules and regulations.

(a) Authorization.

(1) In general. Except as provided in section 1928 (a), Cotton Futures, section 2599, Marihuana, section 2559, Narcotics, section 3176, Liquor, and section 1805, Silver, the Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this title.

(2) In case of change in law. The Commissioner may make all such regulations, not otherwise provided for, as may have become necessary by reason of any alteration of law in relation to internal revenue.

(b) Retroactivity of regulations or rulings. The Secretary, or the Commissioner with the approval of the Secretary, may prescribe the extent, if any, to which any ruling, regulation, or Treasury Decision, relating to the internal revenue laws, shall be applied without retroactive effect. 53 Stat. 467.

Section 3797.

Definitions.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

. . . (9) United States. The term “United States” when used in a geographical sense includes only the States, the Territories of Alaska and Hawaii, and the District of Columbia.

(10) State. The word “State” shall be construed to include the Territories and the District of Columbia, where such construction is necessary to carry out provisions of this title.

(11) Secretary. The term “Secretary” means the Secretary of the Treasury.

(12) Commissioner. The term “Commissioner” means the Commissioner of Internal Revenue.

(13) Collector. The term “collector” means collector of internal revenue.

Section 3900.

Appointment and salary.

There shall be in the Department of the Treasury a Commissioner of Internal Revenue, who

shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to basic compensation at the rate of \$15,000 per annum. As amended Oct. 15, 1949, c. 695, § 5 (a), 63 Stat. 880.

Section 3901.

Powers and duties.

(a) Assessment and collection. The Commissioner, under the direction of the Secretary—

(1) General Superintendence. Shall have general superintendence of the assessment and collection of all taxes imposed by any law providing internal revenue; and

(2) Regulations, forms, stamps, and dies. Shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps, and other matters pertaining to the assessment and collection of internal revenue; and shall provide hydrometers, and proper and sufficient adhesive stamps and stamps or dies for expressing and denoting the several stamp taxes, or, in the case of percentage taxes, the amount thereof; and alter and renew or replace such stamps from time to time, as occasion may require.

Section 3941.

Appointment.

(2) In General. The President, by and with the advice and consent of the Senate, shall appoint for each collection district a collector, who shall be a resident of the same.

(b) Consolidation of collection districts. When two or more collection districts are united by

the President, he may designate from among the existing officers of such districts one collector for the new district, or, at his discretion, he may make a new appointment of such officer for said district.

Section 4041.

Issue of instructions, regulations, and forms.

(a) In General. The President, by and with forms of entries, oaths, bonds, and other papers, and rules and regulations, not inconsistent with law, to be used under and in the execution and enforcement of the various provisions of the internal revenue laws; and he shall give such directions to collectors and prescribe such rules and forms to be observed by them as may be necessary for the proper execution of the law.

Title 28 *U.S.C.A.*

Section 1340.

Internal revenue; customs duties.

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court.

Section 1341.

Taxes by States.

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Section 1343.

Civil rights.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 47 of Title 8;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 47 of Title 8 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

Section 2201.

Creating of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

As amended May 24, 1949, c. 139, § 111, 63 Stat. 105.

Section 2202.

Further relief.

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

Title 48 *U.S.C.A.*

Section 1421b.

Bill of rights.

. . . (e) No person shall be deprived of life, liberty, or property without due process of law.

(f) Private property shall not be taken for public use without just compensation.

. . . (n) No discrimination shall be made in Guam against any person on account of race, language, or religion, nor shall the equal protection of the laws be denied. . . .

Section 1421c.

Certain laws continued in force; modification or repeal of laws; applicability of Acts of Congress.

. . . (b) Except as otherwise provided in this chapter, no law of the United States hereafter enacted shall have any force or effect within Guam unless specifically made applicable by Act of the Congress either by reference to Guam by name or by reference to "possessions".

Section 1421h.

Duties and taxes to constitute fund for benefit of Guam.

All customs duties and Federal income taxes derived from Guam, the proceeds of all taxes collected under the internal-revenue laws of the United States on articles produced in Guam and transported to the United States, its Territories, or possessions, or consumed in Guam, and the proceeds of any other taxes which may be levied by the Congress on the inhabitants of Guam, and all quarantine, passport, immigration, and naturalization fees collected in Guam shall be covered into the treasury of Guam and held in account for the government of Guam, and shall be expended for the benefit and government of Guam in accordance with the annual budgets. Aug. 1, 1950, c. 512, § 30, 64 Stat. 392.

Section 1421i.

Applicability of Federal income tax laws.

The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam. Aug. 1, 1950, c. 512, § 31, 64 Stat. 392.

Section 1422c.

Executive agencies and instrumentalities—Appointment of heads; preferences in appointments and promotions; educational and vocational training; establishment of merit system.

(a) The Governor shall, except as otherwise provided in this chapter or the laws of Guam, appoint, by and with the advice and consent of

the legislature, all heads of executive agencies and instrumentalities. In making appointments and promotions, preference shall be given to qualified persons of Guamanian ancestry. With a view to insuring the fullest participation by Guamanians in the government of Guam, opportunities for higher education and in-service training facilities shall be provided to qualified persons of Guamanian ancestry. The legislature shall establish a merit system and, as far as practicable, appointments and promotions shall be made in accordance with such merit system.

Appointment and removal of officers; powers and duties of officer.

(b) The Governor may appoint or remove any officer whose appointment or removal is not otherwise provided for. All officers shall have such powers and duties as may be conferred or imposed on them by law or by executive regulation of the Governor not inconsistent with any law.

Reorganization.

(c) The Governor shall, from time to time, examine the organization of the executive branch of the government of Guam, and shall determine and carry out such changes therein as are necessary to promote effective management and to execute faithfully the purposes of this chapter and the laws of Guam.

Continuation in office of incumbents.

(d) All persons holding office in Guam on August 1, 1950 may, except as otherwise provided in this chapter, continue to hold their respective

offices until their successors are appointed and qualified.

Title XX Chapter 6

Business Privilege Tax Laws

Section 19500.

Definitions . . .

.16 "Tax Commissioner" shall mean and include the person performing the duties of Commissioner of Revenue and Taxation for the government of Guam and who is charged with the administration and enforcement of the provisions of this act.

Section 19501.

Administration. The following provisions shall govern the administration of this entire Chapter and shall apply to all taxes levied hereunder.

.01. Tax District. The territory of Guam shall comprise one taxing district only and no subdivision thereof shall be made for the purpose of this chapter.

.02. Tax Commissioner. The Commissioner of Revenue and Taxation of the government of Guam (herein known as the Tax Commissioner) shall have the following duties, powers and authority:

.0201. Subordinates. With the approval of the Director of Finance, to designate from among the employees in his division such deputy collectors and internal revenue agents as may be required; provided, however, that the hiring and removal of all such employees shall be done in accordance with the personnel laws and regulations.

.0202. Assessment. He shall make all assessments of taxes levied by this Chapter.

.0203. Collection. He shall be responsible for the acts of his assistant, the Tax Collector, the deputy tax collector and the internal revenue agents, and for the enforcement and collection of all taxes imposed by this Chapter.

.0204. Construction of Revenue Laws. He shall construe the tax and revenue law, the administration of which are within the scope of his official duties, whenever requested by any officer acting under law, or by any interested person, provided that the Attorney General's Office shall give him such aid and assistance as he may require.

. . . .0207. Rules and Regulations. With approval of the Director of Finance he shall make such rules and regulations as he may deem proper within the scope of the law to effectually carry out the purpose of this Chapter, subject to the approval of the Governor of Guam.

Prentice-Hall 1951. 76,213.

I.T. 4046—Guam held to be a possession of the United States for Federal Income Tax purposes. See also 16,718).—

A domestic corporation doing business in Guam which satisfies the conditions set forth in section 251(a) of the Internal Revenue Code is exempt from United States income tax with respect to its income derived from Guam but is required to file returns and pay income tax to the government of Guam by reason of the dual system of taxation created by the Organic Act of Guam (64 Stat. 384; I.R.B. 1950-17, 20).

Advice is requested whether the taxable status of a domestic corporation doing business in Guam which satisfied the conditions set forth in section 251(a) of the Internal Revenue Code is affected by the enactment of the Organic Act of Guam (64 Stat. 384; I.R.B. 1950-17, 20), approved August 1, 1950.

Under section 3 of the Organic Act of Guam, Guam is declared to be "an unincorporated territory" of the United States with the capital and seat of government located at the city of Agana. It is further provided in that section that the government of Guam shall consist of three branches, executive, legislative, and judicial, and its relations with the Federal Government shall be under the general administrative supervision of the head of such civilian department or agency of the Government of the United States as the President may direct. Section 31 of the Act, which was placed in operation as of January 1, 1951, by Executive Order 10211 (I.R.B. 1951-4, 41), reads as follows:

Sec. 31. The income tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam.

Section 30 of the Act provides in part that all Federal income taxes derived from Guam shall be covered into the treasury of Guam and held in account for the government of Guam and shall be expended for the benefit and government of Guam in accordance with the annual budgets.

Under section 251(a) of the Internal Revenue Code, a domestic corporation which satisfies the

conditions stated therein is taxable only with respect to income from sources within the United States. Those conditions are in substance that (1) 80 percent or more of the corporation's gross income was derived from sources within a possession of the United States, and (2) 50 percent or more of its gross income was derived from the active conduct of a trade or business within a possession of the United States.

The island of Guam was ceded to the United States by Spain in accordance with Article II of the Treaty of Peace between the United States and Spain (30 Stat. 1754), signed at Paris on December 10, 1898, and proclaimed April 11, 1899. Guam has been a possession of this country ever since its acquisition. Although it is declared to be an "unincorporated territory" by section 3 of the Organic Act of Guam, it has the same legal status as the Virgin Islands and as that of Puerto Rico prior to enactment of the Revenue Act of 1950, and such status is not similar to that of Alaska and Hawaii.

Section 251(d) of the Internal Revenue Code, as amended by section 221(a) of the Revenue Act of 1950, provides that, as used in section 251 of the Code, the term "possession of the United States" does not include the Virgin Islands of the United States and that such term, when used with respect to citizens of the United States, does not include Puerto Rico. Guam is not mentioned in that section of the Code. However, section 29.251-4 of Regulations 111 provides in part that the term "possession of the United States", as used in sections 251 and 252 of the Code, includes Guam but does not include the Virgin Islands.

Section 3797(a)(9) of the Code provides that the term "United States" when used in a geographical sense, includes only the States, the Territories of Alaska and Hawaii, and the District of Columbia.

Inasmuch as Guam is not excepted from the provisions of Section 251 of the Code, the Bureau is of the opinion that it should be considered a possession of the United States, for Federal income tax purposes, regardless of its classification as an unincorporated territory by the Organic Act of Guam. It follows, therefore, that a domestic corporation which satisfies the conditions set forth in section 251(a) of the Code is taxable, for Federal income tax purposes, only with respect to income derived from sources within the United States.

The effect of section 31 of the Organic Act of Guam is to set up a separate income tax system for Guam which is a duplicate of the Federal income tax system. That section is substantially the same as a proviso contained in the Naval Appropriations Act of 1921 (42 Stat. 122), relating to the Virgin Islands, which reads as follows:

Provided further, that the income tax laws now in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in the Virgin Islands of the United States, except that the proceeds of such taxes shall be paid into the treasuries of said islands.

I.T.2946(C.B.XIV-2, 109 (1935)) holds in part that the United States and the Virgin Islands are separate and distinct taxing jurisdictions al-

though their income tax laws arise from an identical statute applicable to each. It is stated in that ruling that it will be necessary, in some sections of the law (Revenue Act of 1934), to substitute the words "Virgin Islands" for the words "United States" in order to give the law proper effect in those islands. It is believed that the same principles are applicable to Guam in view of the above-mentioned provisions of the Organic Act of Guam.

Accordingly, it is held that a domestic corporation doing business in Guam which satisfies the conditions set forth in section 251(a) of the Internal Revenue Code is exempt from United States income tax with respect to its income derived from Guam but is required to file returns and pay income tax to the government of Guam by reason of the dual system of taxation created by the Organic Act of Guam. (I.T. 4046; 1951-6-13559.)

Federal Rules of Civil Procedure.

Rule 36.

Admission of Facts and of Genuineness of Documents.

(a) Request for Admission. After commencement of an action a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth in the request. If a plaintiff desires to serve a request within 10 days after commencement of the action leave of court, granted with or without notice, must be obtained.

Copies of the documents shall be served with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such shorter or longer time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part, together with a notice of hearing the objections at the earliest practicable time. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party deny only a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder. As amended Dec. 27, 1946, effective March 19, 1948.

(b) Effect of Admission. Any admission made by a party pursuant to such request is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.

Rule 56.

Summary Judgment.

. . . (c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. As amended Dec. 27, 1946, effective March 19, 1948. . . .

(e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

SUMMARY OF THE ARGUMENT.

The appellants contend that the court fell into error when it dismissed the complaint, failed to enter Sum-

mary Judgment for the plaintiff and entered Summary Judgment for defendants, having decided issues of fact upon affidavits, that in effect the court decided these questions before it upon the premise that it is a desirable result, therefore, it must be reached and it is my duty to do so. That the rules, canons of construction and the text of the statutes are guides not binding rules. That despite the clear command of the rules the court entered the Summary Judgment for defendant Kennedy. Appellants contend that it is error and reversible to rule contrary to the rule in an important and basic matter.

Further, that the court was in error when it held as a matter of law that no controverted question of fact existed. All cases which appellants have located hold that a single controverted question of fact precludes the entry of Summary Judgment.

The court erroneously failed to hold, as a matter of law, that all requests for admission of facts requested of defendants were for the purpose of this action admitted due to the failure of defendants to comply either with the letter or spirit of the rule. Of especial significance was the fact that the reply and answer of defendant Kennedy was made for him by defendant Taitano, a clear violation.

The court erred in disregarding the admission of counsel for defendant, made in open court, that no local legislation exists authorizing any department or agency of the Government of Guam to collect an income tax or in fact any official to do so. That the al-

leged collection office had been set up upon the verbal instruction of the Governor. Further, that neither the legislature nor anyone else had created any formal procedures, tax court or avenue of appeal from the rulings of the Commissioner of Revenue and Taxation.

The court buttressed its position upon the Provisions of I.T.4046 issued by the Commissioner of Internal Revenue of the United States in 1951. This is indeed a weak reed to lean upon for numerous reasons. An I.T. is merely an office memorandum or opinion issued to guide the employees of the United States Internal Revenue Bureau in their work. It is not binding upon anyone, even the Bureau itself. It is the opinion of some attorney as to what he thinks the law means. In this case it purports to construe the text of Chapter 8A of title 48 U.S.C.A. This is clearly beyond the powers of any one in the Bureau of Internal Revenue. By statute the Commissioner of Internal Revenue and the Secretary of the Treasury of the United States are authorized solely to promulgate rulings and other instructions with respect to statutes that they are charged with enforcing, but such must be consistent with and not contrary or beyond the scope of the statute and specifically cannot add to, alter, amend or delete the text of the statute. To do otherwise is to legislate and Congress, by the provisions of the Constitution can neither delegate the legislative function to any executive agency or the courts. If the text of I.T. 4046 violates that restriction, it is void. Appellants hold that it does and is

void. If the Commissioner of Internal Revenue of the United States has not the duty to enforce the alleged territorial income tax claimed to be contained in Title 48 U.S.C.A. Chapter 8A then he is without lawful authority to interpret it or to delegate any authority in connection therewith. If the Commissioner of Internal Revenue of the United States has the duty to enforce the income tax laws within Guam, his attempted delegation of this authority and power is illegal and void. Consequently, appellants claim that I.T. 4046 on either ground is void and illegal and constitutes an unlawful attempt to usurp the legislative powers of the Congress and thereby amend an act of Congress by executive action. That the entire system of taxation thereby illegally constructed contrary to the Constitution and Laws of the United States though supported by opinions of the District Court of Guam and the policies of the executive branch of the Government must fall. The plain, clear meaning of a statute cannot be amended either by judicial or executive legislation, policy, needs or desires.

That the court erred and held contrary to the established rule as laid down by the Supreme Court and as expressed by the Congress that the defendants were sued in their official capacities. The pleadings are plain, and clear. These defendants were sued as individuals for acts without warrant in law and in excess of any lawful authority vested in them by virtue of their office. They were for purposes of identification and to delineate the bounds of their lawful au-

thority identified by showing in the complaint the offices which each defendant lawfully and legitimately holds. These defendants were sued in their individual capacity and it is against their illegal, void and personal acts in excess of any authority of their lawful office that the relief herein sought was demanded and the Judgment sought was against these defendants as individuals.

The court erred in its construction of the Organic Act of Guam. Appellants contend that the text of the Organic Act at least with respect to taxation is clear and unambiguous and therefore is not such as requires resort to the canons of statutory construction. That it clearly makes provision for the tax structure, who is to administer it and attempts to dispose of the taxes thereby collected. That this system is complete and requires no construction. That the Act says A. The Income Tax Laws of the United States are likewise in force in Guam. The Rule of Reason it would seem then at once requires one to turn to the text of the United States Income Tax Laws to see what they say—not to the desires, wishes or policies of any executive bureau, department or even Cabinet member. A logical question next arises: Do these laws provide for a system of collection, the necessary procedures, a full appellate procedure and officers duly authorized to administer these laws thereby? It is believed that they do and that that officer is the Commissioner of Internal Revenue of the United States. Is this system complete? The courts of the United States have so frequently held it to be that

no citation of authorities is necessary. Where then is there room, need or in fact authority to construe this statute? It is clear, plain and complete and forms part of the integrated nation-wide system of taxation declared by the Supreme Court to be the intent of the Congress and the requirement of the Constitution. Our next question logically is, what is done with the taxes so collected? Clearly the law requires that as with all taxes collected, it is to be paid into the United States Treasury. There the tax collector's duties and responsibilities end. The fact that another section of the Organic Act directs that these funds so collected will then be transmitted to the Treasury of Guam is not part of the tax law and has no bearing on the administration of a tax law or the powers, authorities and duties of a collector. Is not this proviso herein discussed an act of appropriation of monies? That is not a tax matter and appellants conclude that this fact in no way can be determinative of the existence or non-existence of a tax or show any purpose or intent of Congress as to the creation of a tax or of its administration.

In construing the Laguana case, the District Court of Guam erred in holding that the appellate court ratified every word which the District Court of Guam used to embellish its decision. The rules for the interpretation of judgments and the construction of judgments would seem to hold that all matters in a judgment not necessary to the judgment are dicta and while often fine expressions of judicial reasoning, are to be disregarded in construing and applying a judg-

ment. In the Laguana case, what were the essential points? All others are dicta. The holding of the District Court of Guam was that plaintiff therein failed to state a claim upon which relief could be granted. Any statements in the decision of that case not necessary to that holding are dicta. This decision was upon the pleadings and admissions in that case, nothing more. Upon the facts of that case, no others in this opinion are binding. This case is *res judicata* upon only Laguana, no other. Laguana stipulated that Ansell was the duly constituted officer to collect and receive taxes. The sole other question of moment being the application of Section 251 to Laguana. The judgment was based upon the pleadings directed to but one question. Did Laguana state a claim? Nothing could be considered but the allegation of fact in the complaint and the admissions and allegations of the answer. If they were inadequate, they failed and dismissal was proper. But can this case do more than hold that Laguana failed? Appellants contend not and that this case cannot be authority for any other point. This case cannot be ruling under different factual situations and claims.

The court was in error in holding that the Income Tax Laws of the United States are also territorial tax laws subject to changes in nomenclature. The court closed its mind to a cardinal principle of all tax legislation, namely that taxes shall not be imposed by implication. Taxes shall not be imposed by construction either executive or judicial. That to permit either the executive or in fact the courts to

amend, add to, delete, substitute or alter is to permit legislation by the courts and the executive. This appellants contend is beyond their powers and is contrary to all constitutional standards and safeguards. It violates all canons for the construction of statutes. Wherein do we find such a delegation of legislative power and if found, is it not void?

The court failed to see in this action several important and basic Constitutional questions, among them being the usurping of the legislative powers or its illegal delegation. That the appellants are without an adequate remedy at law. The question of the deprivation of property without due process of law, the denial of the equal protection of the law as well as numerous other Constitutional questions raised by the pleadings were not noticed by the court.

The court erred in disregarding the Federal Rules of Civil Procedure, the provisions of which are mandatory and in failing to require defendants to do likewise. Rule 36 is clear and is mandatory. The court completely disregarded both the spirit and letter of the Rule and permitted the defendants to do likewise.

Therefore, appellants contend that the District Court of Guam should be reversed and this action be remanded for further proceedings and with instructions to enter Summary Judgment for appellants.

ARGUMENT.

Appellants considering the proceedings heretofore had in this action and after reviewing the events

which have transpired find themselves confronted with what to appellants seem innumerable grave errors as well as many other errors, the importance of which, except in the aggregate, is considered minor.

In attempting to briefly point out what fundamental errors appellants believe warrant reversal, they find themselves confronted with the task of condensing these matters into as few words as possible, and yet retaining intelligence in the brief. Accordingly, errors as originally listed will, whenever falling into a related category, be treated together. Appellants do endeavor to present a brief rather than a treatise. The chief difficulty with this problem is that every attempt to place the actual factual situation and the issues actually involved in the record has proved abortive and our major problem has proved to be the fog of procedures.

I.

THE COURT ERRED IN DISMISSING THE COMPLAINT, AND THEREAFTER ENTERING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS RATHER THAN FOR PLAINTIFFS, HAVING DECIDED QUESTIONS OF FACT UPON AFFIDAVITS AT A HEARING UPON A MOTION RATHER THAN UPON TESTIMONY AND EVIDENCE AND WITHOUT CONSIDERING PLAINTIFFS' CITATIONS OF AUTHORITIES (Points 1, 2, 3, 5, 6).

The court was in error when it dismissed the complaint. It would appear to appellants, and they believe that any one perusing the statements made by the court both at the hearing upon the motions and in

the opinion that the mind of the court was completely closed to any concept other than the one expounded by the learned court, to wit:

There is a territorial income tax, that statutory authority is not necessary since by implication such authority as may be required can be assumed, that the Federal Rules of Civil Procedure when attempted to be used complicate rather than clarify the issues, that the matters sought to be presented to the court and various issues raised are of no moment since the entire problem has heretofore been conclusively determined. Therefore, appellants by instituting this action seek to raise issues which are capricious and without merit. That basically the court is of the opinion that the basic fact is the Government of Guam is in need of the monies and that in any event and regardless they are going to have them. It is appellants' belief, with this concept uppermost in mind, the court was led to fall into numerous fundamental errors and disregarded the issues raised by the pleadings and failed to see various basic errors in the proceedings as they occurred. T.R. 71, 72, 85, 91, 100, 105, 110.

Appellants believe that the court erred in dismissing the complaint. The defendants moved to dismiss the complaint on two grounds; (1) failure to state a claim upon which relief can be granted, (2) because the court does not have jurisdiction over the subject matter. T.R. 14.

Their second ground is, we believe, without merit and is answered simply. This action arises under a

statute of the United States and involves the construction and application of the Internal Revenue Code of the United States. Clearly the court does have jurisdiction over the subject matter of the action.

Ground one of defendants' motion, appellants assert, is equally without merit since it is a cardinal rule that upon a motion to dismiss all allegations contained in the complaint must be accepted as true. As recently as the 31st day of January, 1955 the Supreme Court reaffirmed this rule, saying ". . . the allegations of the complaint, on a motion to dismiss, must of course be taken as true . . ." *United States v. Shubert*, U.S. 99 L.Ed. (Advance P. 213.) See also *United States v. International Boxing Club*, U.S. 99 L.Ed. (Advance P. 221.) Therefore to dismiss the complaint upon the motion was improper unless no allegation in the complaint, all being accepted as true, stated a claim upon which relief could be granted. The complaint alleged the taxes to be illegal, the demands of defendants also illegal, T.R. 4, 5. That the sums collected have been converted by defendants, T.R. 7. That defendants have usurped the authorities of the Commissioner of Internal Revenue of the United States, T.R. 8, and have altered and amended the Internal Revenue Code of the United States. That defendants have no statutory authority, T.R. 9. That plaintiffs are deprived of their property without due process of law, T.R. 10. Surely with these allegations construed as true for the purpose of the motion to dismiss, did not the complaint set forth a claim which precluded the court from dismissal. Appellants claim

that it was error to dismiss this complaint. See also *United States v. Nixon*, 12 F.R.D. 122, "When affidavits are relied upon to demonstrate that an issue of fact formally raised by the pleadings is not a 'genuine' issue, there must be compliance with Rule 56(e). The court may enter summary judgment only upon a showing by competent evidence, admissible at trial, that a trial would necessarily result in a directed verdict for the moving party. If such showing is attempted to be made by affidavit, it must clearly negate the allegations of the complaint. To put it in the affirmative, there must be convincing proof that no factual issues remain for determination to resolve the question raised. *Dewey v. Clark*, 86 U.S. App.D.C. 137, 180 F.2d 766, 772; *Arnstein v. Porter*, 2 Cir., 154 F.2d 464, 470." *Wittlin v. Giacalone*, 154 F.2d 20, "We are impelled to that conclusion because it is well established that one who moves for summary judgment has the burden of demonstrating clearly the absence of any genuine issue of fact, and that any doubt as to the existence of such an issue is resolved against the movant. The courts are quite critical of the papers presented by the moving party, but not of the opposing papers. Indeed, Professor Moore says in his work on Federal Practice Under the New Federal Rules: 'Even if the pleading of the party opposing the motion is defective and does not state a sufficient claim or defense, the motion will be denied, if the opposing papers show a genuine issue of fact.' . . ." *Smart v. United States*, 111 F.Supp. 907, "For the purpose of this motion the allegations of the

complaint must be taken as true and unless it appears with absolute certainty that the plaintiff is not entitled to relief upon any theory, the request for summary judgment should be denied.” *Kingan & Co. v. Smith*, 16 F.Supp. 549, “It is the duty of the court to accept as true the allegations of the bill of complaint for the purpose of considering the motion to dismiss.”

Having dismissed the complaint, how was it possible under any system of logic for the court thereafter or even coincident with the dismissal to enter Summary Judgment? Once the complaint was dismissed, there was nothing before the court; the court had nothing upon which to act.

However, in any event, did the court comply with the provisions of Rule 56, p. 27 ante? Did the court consider the requests for admission? Did it consider the form and sufficiency of the affidavits in support of the motion? Did the court consider whether or not there were in fact material questions of fact remaining in the case?

The complaint alleged that defendant Taitano had no legal authority to collect an income tax. Defendant Taitano in his affidavit claims he has such authority, T.R. 16. That these duties have been assigned to his office upon his information and belief, T.R. 17.

The complaint alleges that the Department of Finance has no duties or authority with respect to collection of income taxes. Defendant Elvidge claims that such Department has such authority and duty, T.R. 15.

The complaint alleges that the defendant Kennedy possessed no authority or power to collect income taxes. Defendant Taitano claimed he has. The complaint alleges illegal threats of action both civil and criminal. Defendants did not meet this allegation. The complaint alleges that defendants claim the right to administer, interpret, substitute, delete, amend and add to the text of Title 26 U.S.C.A. Defendants have not met these allegations. The complaint alleges a complete lack of statutory authority. Defendants did not meet this allegation. The complaint alleges the deprivation of property without due process of law. This again is not met. These and other allegations appellants contend are issues of fact, not questions of law. Appellants contend that the facts must be determined; then and then only should they be interpreted by the court and the conclusions of law therefrom derived. How did the court arrive at its determination of the facts? Or rather at the conclusion that no material issue of fact remained upon which the action should be tried!

The court accepted as conclusive of the truth of the facts the affidavits of the defendants, T.R. p. 90 “. . . and those officials have made affidavits that they are the people who normally collect the taxes”, T.R. p. 91, “According to the affidavits, the Government of Guam has set up a tax collection system and that tax collection system extends from the Governor to the Director of Finance through the Collector of Internal Revenue . . .”

In fact, appellants contend that rather than conclusively showing that no material question of fact remains, the affidavits conclusively show that there are several material issues which the court should review evidence upon.

The court after discussing several immaterial matters in and at the hearing, and in its opinions and stating that no statute exists, held that defendants as a matter of law are entitled to Summary Judgment. Appellants claim this is error.

The court precluded plaintiffs from presenting evidence to show the illegal acts of the defendants, evidence to show that defendants have no authority, that defendants have added to, deleted, altered, omitted and in general re-written the text of the Internal Revenue Code of the United States to suit their desires, convenience and fancy.

The court did not consider the requests for admission, the objection thereto and the question as to whether or not as a matter of law the requests were not in fact admitted.

Requests under the rule are, appellants believe, the same as testimony in the case and are to be so considered.

Therefore, appellants contend that the court erred and should be reversed.

II.

**THE COURT ERRED IN ENTERING SUMMARY JUDGMENT
IN FAVOR OF DEFENDANT KENNEDY (Point 4).**

Defendant Kennedy was not entitled to have Summary Judgment entered in his favor for various reasons. First, it has been held in many cases that failure to comply with the provisions of Rule 56 will warrant and support the entry of Summary Judgment against such party. Defendant Kennedy did not answer or deny—in fact, his purported answer was sworn to by defendant Taitano, T.R. p. 70. Thus defendant Kennedy is in the legal position of having admitted for the purposes of this action all the requests for admission of facts.

III.

**THE COURT WAS IN ERROR IN HOLDING THAT NO CON-
TROVERTED QUESTION OF FACT EXISTED (Point 7).**

A controverted question of fact it must, appellants contend, be considered any fact which is material to the issues presented which is not admitted by the litigants and which is of sufficient materiality to the issues that their proper determination hinges or is affected by its resolution.

In this action, appellants claim that numerous questions of fact remain unresolved and that without such resolution it is error to enter judgment.

Basic as it may appear, appellants assert that the most fundamental question to be solved is what is the text of the alleged income tax law, which defendants

claim to be administering and enforcing. Patently and we conclude based upon this entire record, it cannot be the text of Title 26 U.S.C.A. It has been admitted by the defendants, alluded to by the court, and alleged by the plaintiffs without denial that there have been unpublished changes in the text of the Federal Statute to make it conform to the local situation or requirements of the defendants. Plaintiffs have sought without avail to obtain the text of this statute as thus amended. This court cannot obtain the text. It does not exist. Is not the simple text of the statute in question, not its meaning or construction, a fact and a very material fact which must first be ascertained before anyone can intelligently discuss the issues herein raised. Appellants ask this court if the first step in construing, applying and discussing a statute is not to find out what is its text. This action in fact is the case of the unknown law.

It is the case of the Income Tax Laws of the United States as amended but no one knows what amendments have been made or if he knows he will not tell. Is not the very text of the alleged statute in question our first controverted fact. We claim it has not been changed one iota. The defendants claim it has, but will not tell how.

Appellants claim that defendants have no statutory authority authorizing their actions, either federal or territorial. Defendants claim that they have both. Appellants claim that as a fact defendants Kennedy and Taitano have never been duly authorized in any manner to collect, enforce or administer any income

tax. All defendants claim that they have. Appellants claim that defendants as individuals have coerced monies from appellants and converted the same. This defendants deny.

That defendants have coerced the employers of plaintiffs Wilson and White into violations of the terms of Section 1621 *et seq.* and have also coerced plaintiffs Bogovich and Tintorri to violate the same section. This fact has not been resolved.

That defendants have usurped the duties, responsibilities and authority of the Commissioner of Internal Revenue of the United States, have usurped the legislative authority of the Congress and have changed, altered, taken from and added to the statutes of the United States. These issues are material and unresolved.

That the plaintiffs have no adequate means of seeking relief, that the acts of the defendants have deprived plaintiffs of their property without due process of law. These facts have not been determined.

Viewing these, to appellants, vital questions of fact, can it be held either that the District Court of Guam had before it sufficient facts upon which to base a judgment? Can it be held that there was no genuine issue as to any material fact? Can it be determined as a matter of law what the text of a statute or other document, the acts of defendants and their legality, the authorities of the defendants and their source, the violation of mandatory sections of a Federal Statute, the existence of due process of law without the fac-

tual situation, all based upon the court's taking judicial notice of two cases, one involving a jurisdictional point as to the party defendant, the other decided solely upon the question of whether a claim was set forth coupled with two self-serving affidavits of defendants which are replete with hearsay? Appellants contend that a simple reading of the complaint and the affidavits in opposition clearly show the existence of numerous genuine controverted questions of fact and that the court erred when it held to the contrary.

Appellants contend that a fact is an event or happening, circumstances from which conclusions of law should be derived. Can they be derived until and unless the fact itself is determined? We believe not. Therefore, our belief is that the court was in error. Is not a fact that thing the existence of which we must establish before we can draw valid conclusions? This we believe.

IV.

THE COURT ERRED IN NOT FINDING ALL THE REQUESTS FOR ADMISSIONS OF FACT IN THE PRESENT ACTION TO BE PURSUANT TO RULE 36 ADMITTED AS A MATTER OF LAW (Point 8).

Appellants on the 19th day of July, 1954 served upon the defendants identical requests for the admission of facts pursuant to the provisions of Rule 36. These requests of necessity were long, due both to the complexity, or rather the existing confusion,

of the matter and for the practical matter that short, brief, simple and uninvolved statements are easier to answer either yes or no; or to explain if necessary. A further practical matter of course is the fact that it is much easier to equivocate and evade meeting the point in a long, involved and rambling statement than in a short, terse one covering but one fact. These requests for admission fall into, appellants believe, clear-cut headings. Namely, the claims of defendants, the text of the alleged territorial income tax, the existence of directives, the delegation to defendants of authority, the truth of certain acts of the defendants. Appellants contend that all facts sought are relevant to this action and are within the personal knowledge of some or all of the defendants and that all defendants could with little effort determine their truth, falsity or raise valid objections to each statement.

Appellants contend that the text of the alleged territorial income tax law is both vitally relevant and material but that it is a fact. If the text of Title 26 U.S.C.A. has not been changed or altered, it is simple to say so. Since the territorial tax alleged to be in existence has never been published, this it would seem is a fact peculiarly within the knowledge of the defendants. Appellants contend that substantially all of the requests for admissions are within the provisions of Rule 36 relevant matters of fact and proper material to be included in such request.

Appellants contend that the defendants violated the intent of the Rules in two major items. First defendants did not seek a ruling on their objections to the

requests, and secondly the form of their objections is such as to render it as a practical matter impossible to match up their various objections with the statements to which they refer.

Appellants contend that this response is so at variance with the letter and the spirit of the rules as to vitiate these responses or objections and to amount to an admission in law of the truth of all facts set forth in the requests.

Appellants contend that the District Court of Guam violated the rule and was in error in not passing upon each requested statement of fact, giving its ruling and if, as to any statement of fact, an admission should properly be made directing the defendants to so admit.

The appellants were by this violation of the rules precluded from having in the records of this action certain admissions of fact which are material to the issues herein sought to be determined and in view of the provision that such matters so admitted will for the purposes of the instant case be considered as if testified to in court and have the same weight as other testimony, the appellants have been deprived of a substantial right, the purpose of the rules has been subverted and the court thus erroneously precluded competent evidence from being considered.

Appellants construe the method used by defendants in objecting to the requests for admission was calculated to defeat the purpose and intent of the rule and cannot fail to agree that it succeeded.

Appellants contend that certain of the objections made by defendants are patently without merit and that as a matter of law those statements stand admitted. Into this category appellants claim fall the following objections: T.R. p. 60, 1. (a) "Admissions as to whether certain authority has been delegated such as Items 47, 58, 57, 58, 59, 60, 61, 62, 103. (d) Admissions as to whether "interpretations" have been made of the law, such as Items 26, 27, 28, 29. (e) Such miscellaneous admissions as whether the Government of Guam has taken certain official actions (Items 7, 91); whether the taxpayer has "appellate or other rights" (Item 92); whether a "technical staff" exists (Item 93); whether a tax court exists and what is its jurisdiction (Items 81, 82); as to the function of the Commissioner of Internal Revenue (Item 80); whether Guam is in a collection district (Item 76); whether the Secretary of the Treasury has authority to delegate (Item 104); whether defendants acted through "agents and servants" (Items 24, 25); whether defendants "personally * * * accepted payments" (Items 24, 25). With respect to a statement the truth of which should be admitted in part, Rule 36 provides that the party shall specify so much as is true and deny or object to the remainder. Into this category fall the following objectives: T.R. p. 60, 1. (a) "Admissions as to whether or not certain legislation exists, and if it does exist, what it consists of or does not consist of, such as items 1, 2, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 30, 31, 32, 33, 53, 64, 65, 83, 84, 85, 88, 94, 95,

96, 99, 100, 101, 102, 107.” Appellants believe that it is neither necessary nor desirable to go into a complete analysis of the evasive and improper objections in this action, it being sufficient to point out their existence and not burden this court with a needless discourse.

Appellants believe that substantially all, if in fact not all, of the requests for admissions are relevant, material and proper for the proper determination of the issues in this case and that the court erred in not requiring defendants to either answer, deny, in whole or in part, and with particularity as provided by the rule and with respect to the remainder to object to each on all proper grounds in numerical order. It is as improper so appellants claim to permit such a jumbled objection as to permit the joining of numerous unrelated claims for relief in a one paragraph complaint.

Appellants contend that the court was in error in not striking or disregarding the objection to the admission and holding that the same had been as a matter of law answered in the affirmative, particularly Nos. 1-9, 11-32, 37, 44-48, 57-60, 67-70, 74, 76, 77, 79-81, 84-89, 91-94, 96, 100-103, 105, 106, 108, 109.

Appellants ask one question, “Why are the defendants unwilling to make known what they claim is the text of the Income Tax Law they claim to be administering; why refuse to make public any changes they have claimed to have made; why do they hide their alleged source of authority; why are defend-

ants unwilling to make known what they profess to claim is a public law?" Can it be that defendants themselves do not know what the facts are and cannot produce the text of their alleged law, their alleged authorities? It has long been a rule that he who is silent when he should speak dare not.

Anna M. Fountain v. Paul Filson, 93 L.Ed. 971.

"Summary judgment may be given, under Rule 56, only if there is no dispute as to any material fact. There was no occasion in the trial court for Mrs. Fountain to dispute the facts material to a claim that a personal obligation existed, since the only claim considered by that court on her motion for summary judgment was the claim that there was a resulting trust. When the Court of Appeals concluded that the trial court should have considered a claim for personal judgment it was error for it to deprive Mrs. Fountain of an opportunity to dispute the facts material to that claim by ordering summary judgment against her. The judgment of the Court of Appeals is, therefore, reversed and the cause remanded to the District Court for further proceedings in accordance with the opinion of the Court of Appeals as here modified."

Durasteel Co. v. Great Lakes Steel Corp., 205 F.2d 438.

"A summary judgment should not be entered unless it clearly appears that there is no genuine issue as to a material fact. Rule 56 of the Federal Rules of Civil Procedure, 28 U.S.C.A.; *Dulansky v. Iowa-Illinois Gas & Electric Co.*, 8 Cir., 191 F.2d 881; *Traylor v. Black, Sivalls & Bry-*

son, Inc., 8 Cir., 189 F.2d 213; Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967.”

Parke, Davis & Co. v. American Cyanide Co.,
207 F.2d 571.

“The courts are reluctant to decide important issues by summary judgment because of the lack of a record adequate to explain the issues of fact and law, *Estepp v. Norfolk & Western Ry. Co.*, 6 Cir. 192 F.2d 889. But here the issues are clarified by extensive interrogatories filed by both parties and answered fully. Also appellant agrees that there are no issues of fact involved in the specific grounds stated in the motion for summary judgment. Since the action is for infringement the validity of the patent is not involved but its scope is sharply in issue.”

Shawmut, Inc. v. American Viscose Corp., 12
F.R.D. 488.

“ * * * (7) It is objected also that many of the requests call upon the defendants to admit controversial issues and that they seek to elicit opinions. A quotation from the opinion of Judge Ridge in *Knowlton v. Atchison, T. & S. F. Ry. Co.*, D.C., 11 F.R.D. 62, 65, is appropriate: ‘The term “otherwise improper” contained in Rule 36(a) is a broad one, but, notwithstanding that fact, its application is circumscribed by being addressed “to the sound discretion of the district courts.”’ *Moore’s Federal Practice*, 2d ed. Vol. 3, 2722. It was not intended thereby to authorize or permit the making, and obtaining, of rulings before trial on every objection that may be leveled

at requests for admissions. Said provision was inserted in Rule 36(a) so that protective orders, such as are contemplated in Rule 30(b), might be made to the end that "absurdly onerous", unfair and burdensome requests or tactics, might not pervert the benefits intended to be accomplished by provisions of Rule 36(a).' The term 'otherwise improper', therefore, is not a 'catch-all' to encompass objections addressed to the admissibility at the trial of matter contained in the requests, but provides a means for protecting the party called upon to answer, from onerous and unfair requests.'"

Southern Ry. Co. v. Crosby, 201 F. 2d 878.

" * * * Parties may not avoid the failure to deny matters necessarily within their knowledge by giving any such evasive answer as was given here. The rule requires a sworn statement denying 'specifically' the matters of which an admission is requested or a statement 'setting forth in detail' the reasons why an admission or denial cannot truthfully be given. As said in Barron & Holtzoff, Federal Practice and Procedure, Rules Edition vol. 2 pp. 543, 544: 'A denial in such sworn statement must fairly meet the substance of the requested admission, and when good faith requires that a party deny only partly or with a qualification, a matter as to which an admission is requested, he must specify and admit so much of it as is true and deny only the remainder. The admissions or denials must be forthright, specific, and unqualified. A denial coupled with a general exception of doubtful import, will constitute an admission.' "

V.

THE DISTRICT COURT OF GUAM WAS IN ERROR IN NOT CONSIDERING THE ADMISSION OF COUNSEL FOR DEFENDANTS MADE IN OPEN COURT AND IN HOLDING THAT THE DEFENDANTS OR ANY OF THEM HAVE AUTHORITY TO COLLECT INCOME TAXES UNDER SECTION 31 OF THE ORGANIC ACT, THE UNITED STATES INTERNAL REVENUE CODE OR ANY APPLICABLE LAWS OF GUAM BASED UPON AN ERRONEOUS INTERPRETATION OF I.T. 4046 (Points 9, 10, 11).

The District Court of Guam erred in disregarding the statements and admissions made in open court by counsel for defendants. Such admissions are as much a part of the records and files in the action as are admissions made in the pleadings. They may narrow the issues, eliminate the need for proof, may establish important, contested points.

Mr. Otto and Mr. Rosenberry, Assistant Attorney Generals of Guam made the admission that there is no local statutory authority.

T.R. p. 101:

“The Court. Now let me ask these questions of the Government of Guam: You have no tax collecting legislation specifically affecting income tax?

Mr. Otto. No legislation by the Government of Guam Legislature specifically directing a department or agency to collect the income tax, as provided under Section 31. However, of course, the money for the Department of Finance which includes the sums necessary to operate the necessary position of the Commissioner of Internal Revenue and other employees.

The Court. The Government of Guam has not specifically enacted any statutory legislation authorizing any particular official to collect income tax. Now that is a fact?

Mr. Rosenberry. Yes, sir.

The Court. The machinery which you are now using to collect the income tax has been set up by administrative order?

Mr. Otto. It has been set up by the Government of Guam by directive from the Governor to the Department of Finance. I wouldn't say there has been an executive order though.

The Court. You have set up this machinery by direction of the Governor, that income taxes shall be collected through those methods and by that agency which collects other taxes?

Mr. Otto. That is correct, your honor."

T.R. p. 102:

"The Court. You do not have any statutory method for taking an appeal from the rulings of the Commissioner of Revenue and Taxation?

Mr. Otto. The Legislature of the Government of Guam has not set up any formal procedure and the Governor of Guam, as head of the executive department, has not established any formal tax court, but for that matter, which is mentioned also in Mr. Crain's affidavit, it may be pointed out that whether or not the United States tax court is available to hear appeals from decisions of the Commissioner of Revenue and Taxation and to assess them is a matter that is a conclusion of law to be decided, presumably, by some court and any statements made by myself, for instance, are mere matters of opinion."

T.R. p. 103:

“The Court. That is what I said at the outset and neither the Legislature nor the Governor of Guam has established a method of appeal from the rulings of the Commissioner of Revenue and Taxation?”

Mr. Otto. That is correct, sir, there is no method established whereby the rulings of the Commissioner of Revenue and Taxation could be reversed by an official of the Government of Guam.

The Court. Do you have any procedure for holding that tax in trust until the matter is determined?

Mr. Otto. No such procedure has been established to hold it in trust.”

T.R. p. 104:

“Mr. Otto. Well, we don’t necessarily deny that. We say that further proceedings in a tax court are possible. We don’t know what court.”

These admissions are basic and important. They go to the heart of the matter. Namely these defendants have no statutory authority, they have no procedures, they have no system. Their authority stems by implication from a one-sentence section in the Organic Act.

These admissions admit much of the complaint. Surely it was error for the District Court to ignore them.

Basically, however, appellants believe that the major vice of the entire position of the Government is contained within I.T. 4046, pp. 21-23 ante. This pub-

lication, when read in conjunction with the pertinent provisions of the United States Internal Revenue Code set forth on pp. 8-15 ante and of the Organic Act of Guam, pp. 17-21 ante is fantastic.

Yet it is this I.T. published by the Bureau of Internal Revenue that is the Bible for not only the Department of the Interior and the Government of Guam, but also the District Court of Guam. Reading it raises several questions. Studying it brings forth certain conclusions.

First, we may ask the question, "By what right does the Secretary of the Treasury, the Commissioner of Internal Revenue, or any of his subordinates, presume to interpret any portion of Title 48 U.S.C.A.?" By statute, and this can be their only authority, they are restricted to interpreting the Internal Revenue Code, Sec. 4041 T 26 U.S.C.A. p. 15 ante, Sec. 3901 T 26 U.S.C.A. p. 14 ante.

If then we consider the authority of anyone in the Treasury Department in the light of the statutes of the United States, we can only reach one conclusion. They may only interpret and construe those statutes which they have been specifically authorized to, in other words, United States Revenue Statutes. For them to interpret any others is merely to offer a gratuitous opinion of no import. Appellants contend that this is the value of I.T. 4046.

Appellants hold and believe that I.T. 4046, the foundation upon which the entire alleged territorial

tax is built, is void and of no effect. That it is contrary to the express provisions of the statute in question. That the General Counsel of the Bureau of Internal Revenue, or in fact anyone in that bureau, is without authority to interpret any part of Title 48 U.S. C.A. since as they claim they are not charged with administering or enforcing that act.

That when the act is properly viewed the purpose and effect of I.T. 4046 is for the furtherance of inter-departmental policy and contrary to the command of the statute. This I.T., the opinion of an attorney, who has no responsibility in the premises, provides a basis and excuse for the Commissioner of Internal Revenue of the United States to abandon his duties under the Statutes and to illegally delegate them to individuals not authorized to exercise them.

If the Bureau of Internal Revenue has the legal authority to interpret Section 1421i T 48 U.S.C.A. then it also has the responsibility to administer that section. If this is so, the attempted legislation contained in I.T. 4046 is void and the interpretation of that section is in error. If there is no authority to interpret the section, of course the attempt to do so is void. Appellants conclude that in either case I.T. 4046 is null and void and must be disregarded.

Appellants contend that I.T. 4046 must be viewed in this light, that it is at the most the opinion of an attorney. That it has no other force and effect other than that of an office instruction. That it misconstrues the statute it purports to interpret. That it is

an attempt to legislate and to alter and add to a Federal statute, that which Congress has not enacted. That it attempts to delegate, contrary to statute, the duties of the Commissioner of Internal Revenue. That I.T. 4046 is therefore void in its entirety. That the District Court of Guam was in error in accepting the theories advanced in I.T. 4046 and erred in not holding it void. The following cases, appellants believe, fully refute the position of the court and the Government of Guam with respect to I.T. 4046, its meaning and effect.

Crocker v. Lucas, 37 F. 2d 275.

“It is settled by many recent decisions of this court that a regulation by a department of government, addressed to and reasonably adapted to the enforcement of an act of Congress, the administration of which is confided to such department, has the force and effect of law if it be not in conflict with express statutory provision.” *Maryland Casualty Co. v. United States*, 251 U.S. 342, 349, 40 S.Ct. 155, 157, 64 L.Ed. 297.”

Aluminum Co. of America v. United States, 123 F. 2d 615.

“Of course, neither Treasury Regulations nor administrative practice are determinative of the Law. The opinions of general counsel for the Bureau of Internal Revenue upon which the defendant relies for the retroactive enforcement of the new regulation were merely advisory. In no sense did they constitute rules or regulations having the force of statutes.”

Jones v. Gaylord Guernsey Farms, 128 F. 2d 1008.

“A regulation promulgated by an administrative body charged with the administration of an act is entitled to great weight, and unless contrary to the legislative intent, ought to be upheld. *United States v. Stanolind Crude Oil Co.*, 10 Cir., 113 F. 2d 194; *Nicholas v. Richlow Mfg. Co.*, 10 Cir., 126 F. 2d 16.”

Allis v. LaBudde et al, 128 F. 2d 838.

“Although the Commissioner, with the approval of the Secretary, is authorized to prescribe all needful regulations for the enforcement of Revenue Acts, it needs no argument that he cannot, by such regulations, alter or amend an Act, or limit rights granted by it. Cf. *Morril v. Jones*, 106 U.S. 466; 1 S.Ct. 423, 27 L.Ed. 267.”

Margaret C. Lynch v. Tilden Produce Company, 68 L.Ed. 1034.

“Section 251 of the Revised Statutes confers upon the Secretary of the Treasury authority to make certain rules and regulations, but it grants no power to the Commissioner of Internal Revenue alone. To make any regulation by him on the subject effective, it must be approved by the Secretary, in which event it really becomes a regulation of the latter. Moreover, the rules and regulations authorized by §251 are required to be ‘not inconsistent with the law.’ The regulation prescribed a standard which Congress has not authorized the Commissioner or the Secretary to fix.”

Spreckels v. Commissioner of Internal Revenue,
119 F. 2d 667.

“Incidental to the Commissioner’s authority to administer the income tax law is the power to make regulations for the information of the taxpayers, the guidance of the collectors, and the realization of purposes of the taxing acts. Section 62 of certain of the later Revenue Acts (notably, 1934, 48 Stat. 680, 700, 26 U.S.C.A. Int. Rev. Code, sec. 62) furnishes specific authority for the publication of such regulations and under that section was published Regulation 86, relating to the income tax under the Revenue Act of 1934.”

Commissioner of Internal Revenue v. Produce Reporter Co., 207 F. 2d 586.

“Although the Commissioner has authority to issue regulations for the enforcement of the revenue laws, such authority does not extend to the establishment of rules of substantive law creating presumptions of fact which are out of harmony with the statute involved.”

Van Antwerp v. United States, 92 F. 2d 871.

“. . . On March 4, 1929, the Bureau of Internal Revenue issued Ruling I.T. 2457, which recited the change in the California law, and stated: . . . Such I.T. rulings have ‘none of the force or effect of Treasury Decisions and do not commit the Department to any interpretation of the law.’ *Ambassador Co. v. Commissioner* (C.C.A. 9) 81 F. 2d 474, 481. . . . Further, since this I.T. ruling is not a ‘Regulation’ or even a ‘Treasury Decision’, it does not have the quality

of a law of which the taxpayer is charged with knowledge.”

Commissioner of Internal Revenue v. Betts, 123 F. 2d 534.

“If the regulations go beyond the statute they are void. The scope of Congressional enactment cannot be enlarged by a departmental regulation.”

Combs v. United States, 98 F. Supp. 749.

“It is, of course, basic that the Congress may not delegate to administrative offices the legislative powers vested in it. *Schechter Poultry Corp. v. U.S.*, 295 U.S. 495, 529 530, 55 S.Ct. 837, 79 L.Ed. 1570. It is the nature of the power which determines whether the delegation is legal. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 420, 55 S.Ct. 241, 79 L.Ed. 446. A good distinction is that when the Congress makes a delegation of its legislative powers, it gives some administrative officer a discretion to say what the law shall be. This it may not do, but it can confer on such administrative authority discretion as to how the law having been established by Congress is to be executed.”

United States v. Bennett (Two Cases), 186 F. 2d 407.

“On the basis of these rulings of the Income Tax Unit of the Bureau, made to order for the commissioner by his legal staff, and having no more binding or legal force than the opinion of any other lawyer, the collector claims: that the statute though intended as a relief measure, does

not relieve these taxpayers; that this is so simply because it is known at the time the calf is dropped that, whether it goes to market as a calf or as a worn out breeder, to market it will go."

Busey v. Deshler Hotel Co., 130 F. 2d 187.

"... To become binding, interpretative regulations must be reasonable and in furtherance of the intention of Congress, as evidenced by its Acts. An arbitrary regulation of the Commissioner of Internal Revenue is not enforceable. Where the language of a taxing statute is plain and unambiguous, there is no occasion for resort to interpretative promulgations of the Treasury Department. Neither the administrative officers nor the courts may supply omissions or enlarge the scope of the statute. See *Iselin v. United States*, 270 U.S. 245, 250, 46 S.Ct. 248, 70 L.Ed. 566."

Clicquot Club v. United States, 13 F. 2d 655.

"The Revenue Act of 1918 (section 1309 (Comp. St. Ann. Supp. 1919, § 63711½i)) gave to the Commissioner of Internal Revenue authority 'to make all needful rules and regulations for the enforcement of the provisions of this act,' but I take it this authority does not extend so far as to permit the Commissioner, by regulations or rulings, to increase the measure of the tax imposed by section 628 on manufacturers of beverage merely because the taxpayer had failed to comply with the strict letter of the regulation or ruling. The regulations must be kept within the law. *Waite v. Macy*, 246 U.S. 606, 38 S.Ct. 395, 62 L.Ed. 892. The administrative officers may not by regulations enlarge or abridge the obligations im-

posed by the statute. To exercise such power is to legislate, and not to regulate. *U.S. v. United Verde Copper Co.*, 196 U.S. 206, 25 S.Ct. 222, 49 L.Ed. 449; *International Ry. Co. v. Davidson*, 257 U.S. 506, 42 S.Ct. 179, 66 L.Ed. 341. Statutes imposing taxes are not to be extended by implication. *U.S. v. Merriam*, 263 U.S. 179, 44 S.Ct. 69, 68 L.Ed. 240, 29 A.L.R. 1547. A fortiori such statutes cannot be extended by regulation.”

Appellants hold that not only is the entire basic premise invalid, but that it is impossible, by the opinion of one attorney, to construct an entire system of taxation reading into the United States statutes and the Statutes of Guam that which neither the Congress nor the legislature saw fit to put there. Pertinent portions of the Statutes of Guam are found at pp. 20-21 ante.

VI.

THE COURT ERRED IN HOLDING THAT THE DEFENDANTS WERE SUED IN THEIR OFFICIAL CAPACITIES (Point 12).

The fact that an individual holds public office does not of itself cloak every act of that individual with his official capacity. Does sovereign immunity extend so far that it is a shield to every government officer or employee who may wish to shield behind it every wrongful, illegal, arbitrary, void or other act of his which is contrary to law, in excess of his authority, without authority, or is actually illegal?

Appellants hold that such is not the case. While admitting that acts within the scope of lawful au-

thority are protected, appellants believe that all other acts are on a par with the acts of any private person, standing or falling upon their own merits and not by the aid of a legal fiction.

Nakasheff v. Continental Ins. Co., 89 F.Supp. 87.

“... Judge Learned Hand in *Sims v. Stuart et al*, D.C.S.D.N.Y., 291 F.707, in dealing with the status of a Collector of Customs observed: ‘He is not even accountable for such illegal acts as an official, but individually. *Smietanka v. Indiana Steel Co.*, 257 U.S. 1, 42 S.Ct. 1, 66 L.Ed. 99. If he has committed a trespass, he is subject to the same law as though he held no office, but to no different remedies, except as some statute provides it. He should have no protection from his possession, but he should suffer no added liability.’ Later, Judge Augustus N. Hand in *Conklin et al v. Newton*, 2 Cir., 34 F.2d 612, 614 observed, in a suit against a defendant personally (who was at the time Collector of the Port of New York): ‘Without some exoneration by statute, the collector, though a public official, is personally liable for unwarranted acts. Thus collectors have been held individually responsible for taxes unlawfully collected.’ ”

Farrell et al v. Moomau et al, 85 F.Supp. 125.

“The contention of the defendants that this suit is a suit against the United States, which has not consented to be sued, cannot be sustained. It has generally been held that the United States is not an indispensable party where, although the official acts under a valid statute, he actually ex-

ceeded the authority with which the statute invested him. *Work v. Louisiana*, 269 U.S. 250, 46 S.Ct. 92, 70 L.Ed. 259; *Payne v. Central Pac. Ry. Co.*, 255 U.S. 228, 41 S.Ct. 314, 65 L.Ed. 598; *Philadelphia Co. v. Stimson*, 223 U.S. 605, 32 S.Ct. 340, 56 L.Ed. 570.”

Mine Safety Appliance Company v. Forrestal,
90 L.Ed. 140.

“ . . . For according to these cases, if we assume, as we must for the purpose of disposing of the jurisdictional issue, that appellant’s allegations including the one that the Renegotiation Act is unconstitutional are true, the fact that the Secretary had acted pursuant to the command of that statute would have made no difference. These cases hold that a public officer can not justify a trespass against a person’s property by invoking the command of an unconstitutional statute. Under such circumstances, the tort becomes the officer’s individual responsibility, and the government is not held to have sufficient interest in the controversy to be considered as indispensable party.”

Lawrence Yearsley v. W. A. Ross Construction Co., 84 L.Ed. 554.

“Where an agent or officer of the Government purporting to act on its behalf has been held to be liable for his conduct causing injury to another, the ground of liability has been found to be either that he exceeded his authority or that it was not validly conferred. *Philadelphia Co. v. Stimson*, 223 U.S. 605, 619, 620, 56 L.Ed. 570,

576, 577, 32 S.Ct. 340. See *United States v. Lee*, 106 U.S. 196, 220, 221, 27 L.Ed. 171, 181, 182, 1 S.Ct. 240; *Noble v. Union River Logging R. Co.* 147 U.S. 165, 171, 172, 37 L.Ed. 123, 125, 126, 13 S.Ct. 271; *Tindal v. Wesley*, 167 U.S. 204, 222, 42 L.Ed. 137, 143, 17 S.Ct. 770; *Scranton v. Wheeler*, 179 U.S. 141, 152, 45 L.Ed. 126, 133, 21 S.Ct. 48; *American School v. McAnnulty*, 187 U.S. 94, 108, 110, 47 L.Ed. 90, 96, 97, 23 S.Ct. 33.”

United States of America, Appellant, v. Alice Gray Kales, 86 L.Ed. 133.

“ . . . As Congress had enacted provisions for indemnification of the collector by the Government, the implication necessarily arose that the taxpayer could maintain an action against him. See (July 1, 1862) 12 Stat. at L. 432, 434, Chap. 119; (March 3, 1863) 12 Stat. at L. 713, 729, Chap. 74; (March 3, 1863) 12 Stat. at L. 741, Chap. 76; (June 30, 1864) 13 Stat. at L. 223, 239, Chap. 173.

“The right of action thus continued is identical with that which existed before Congress had acted. Notwithstanding the provision for indemnifying the collector and protecting him from execution, the nature and extent of the right asserted and the measure of the recovery remain the same. It was payment to the collector which gave rise to the suit against him and limited the amount of the recovery. The judgment against the collector is a personal judgment, to which the United States is a stranger except as it has obligated itself to pay it. See *Sage v. United States*, 250 U.S. 33, 63 L.ed. 828, 39 S. Ct. 415, *supra*; *Smietanks v. Indi-*

ana Steel Co., *supra* (257 U.S. 4, 5, 66 L.ed. 100, 101, 42 S. Ct. 1).''

Clearly herein the defendants are not being sued in their official capacities nor for their official acts, but rather for illegal, arbitrary acts performed by virtue of their official positions and authority or right. The relief sought is against these defendants as individuals. They are for ease of identification set forth in the complaint by title.

Appellants contend the court was in error and that it should be reversed with instructions to receive evidence and enter judgment against defendants as individuals.

VII.

THE COURT WAS IN ERROR IN ITS CONSTRUCTION OF THE ORGANIC ACT OF GUAM AND IN ITS INTERPRETATION OF THE LAGUANA CASE (Points 13, 14).

This court may take judicial notice of the terms of the Organic Act of Guam. The pertinent provisions of which are set forth for convenience pp. 17-19 ante.

This act is a statute of the United States and should be construed in accordance with the canons for the construction of United States laws as formulated by the courts of the United States.

The primary canon is so elemental that to many it would not at first glance appear to be a canon. Let us take the text of the statute, read it and see what it says. If it is clear, unambiguous, does not lead to

absurdity and on its face provides a workable enactment, there is no room for nor need to construe. Construction is not the end in view, it is to be resorted to when necessary, not automatically.

Lindstrom v. Commissioner of Internal Revenue, 149 F.2d 344.

“ . . . The will of Congress has been plainly expressed in language that does not permit or require a strained or unnatural interpretation. The words of the statute may not be extended or distorted beyond their plain, popular meaning. See *Helvering v. Hammel*, 311 U.S. 504, 61 S. Ct. 368, 85 L.Ed. 303, 131 A.L.R. 1481; *Woolford Realty Co. v. Rose*, 286 U.S. 319, 52 S.Ct. 568, 76 L.Ed. 1128.”

McCarthy v. M & M Transp. Co., 160 F.2d 322.

“ . . . Here we are asked to determine what Congress meant when it used the words in Sec. 8(b) ‘in the case of any such person who, in order to perform such training or service, has left or leaves a position * * *.’ The language of the Act is clear and unambiguous. ‘The first resort in ascertaining the legislative intent is to give words used in a statute their natural, ordinary and familiar meaning and that meaning will be applied unless Congress has definitely indicated the words in the statute should be construed otherwise. The plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow or strained construction.’ *Western & Southern Life Ins. Co. v. Huwe*, 6 Cir., 1941, 116 F.2d 1008, 1009.”

Mabel G. Reinecke v. Frank G. Gardner, 72 L.ed. 866.

“But whatever purpose Congress may have had, we think the language of Sec. 212 falls short of indicating any intention to enlarge the classes of taxpayers mentioned in title II. The extension of a tax by implication is not favored. *United States v. Whitridge*, and *Smietanka v. First Trust & Sav. Bank*, *supra*.”

Helvering v. Stockholms Enskilda Bank, 79 L.ed. 211.

“In the foregoing discussion, we have not been unmindful of the rule, frequently stated by this court, that taxing acts ‘are not to be extended by implication beyond the clear import of the language used’, and that doubts are to be resolved against the government and in favor of the taxpayer.”

Brown v. Magruder, 25 F.Supp. 161.

“This court in construing a statute cannot be controlled by results, whether they be favorable or unfavorable to either party to the controversy, including, of course, the Government. The tax desires or needs of the Government are to be given no heed by this court unless it is clear they are being satisfied in legitimate ways.”

Helvering v. New York Trust Co., 78 L.Ed. 1361.

“The rule that where the statute contains no ambiguity, it must be taken literally and given effect

according to its language is a sound one not to be put aside to avoid hardships that may sometimes result from giving effect to the legislative purpose.”

Santa Monica Mountain Park Co. v. United States, 99 F.2d 450.

“It is fundamental that the province of construction of statutes lies wholly within the domain of ambiguity. The rules of construction are an aid to resolve doubts and not to create them. *Ruggles v. Illinois*, 1883, 108 U.S. 527, 2 S. Ct. 832, 27 L. Ed. 812; *Wisconsin R.R. Comm. v. Chicago, B. & Q. R. R. Co.*, 1922, 257 U.S. 563, 42 S.Ct. 232, 66 L.Ed. 371, 22 A.L.R. 1086; *Riverdale Co-operative Creamery Ass’n v. Commissioner*, 9 Cir., 1931, 48 F.2d 711.”

Applying those canons, is construction necessary or in fact permissible with respect to the tax provisions of the Organic Act of Guam?

Appellants contend that if the pertinent provisions of the Organic Act of Guam are properly viewed, there is spelled out, clearly, without ambiguity the plain intent of Congress, that it is a practical, workable system and does not require either judicial or executive legislation to make it effective. That if properly interpreted and applied it avoids all the pitfalls and objections otherwise presented, in fact avoids the Constitutional objections presently raised against the Act as now construed and applied.

Reading Section 1421; T 48 U.S.C.A. what do we derive from the plain, simple, everyday language there

used. The present income tax laws of the United States and those in the future will be in effect within Guam. Does that mean anything else than what it says? Appellants claim it does not. They base their contention upon the old and well founded rule that when a statute is thus incorporated by reference it is carried over in toto. Is there anything illogical about this?

Now assuming that this section has within itself the text of the income tax laws of the United States, is not our next step in logic to look at the income tax laws of the United States to see what they say? Will they as a practical matter work thus incorporated? Are there any ambiguities?

They provide, we discover, a complete system of income taxation. They provide for collection, assessment, full means of enforcement and they clearly specify who has the authority and duty to administer, collect, assess and interpret. Is there any lack of clarity here? In what way will not the United States Internal Revenue Code function as written and under the supervision of the named officials of the United States? Do we not therefore have, if we take the plain meaning of the words of Section 1421; a system of taxation which presents no difficulties, which needs no construction, and which is clearly in conformity with the plain command of the statute? Appellants so contend and believe.

Reading Section 1421 h of Title 48 U.S.C.A. and applying the same yardstick, we discover that this is not a tax section; it is merely a quasi-appropriations

act. It grants to the Government of Guam all of certain Federal taxes and other receipts. This section clearly has no bearing upon the collection, administration or enforcement of any tax; it is a pure gift section, giving funds from the Treasury. We may pass it by.

Thus appellants contend and properly, we believe, that there is no need for applying any canons of construction to Section 1421; it is clear and provides the entire method and authority for its implementation and the District Court of Guam misconstrued its meaning. The District Court of Guam was not warranted in construing this section since it is plain and to do so was to judicially legislate. The executive branch of the Government of Guam has likewise misconstrued this section and is attempting to create a taxing system by implication and by executive legislation. Neither proper, warranted by the facts, nor is it necessary. The court was in error in holding that this section meant anything other than what the plain words say.

The court also misconstrued the *Laguana* case, 102 F.Supp. 919. It is apparent at once, when this case is read, that it did not and could not cover or contain the various rulings cited by the court. This case was decided upon one point; all else it is claimed, is dicta. Did the complaint state a claim upon which relief could be granted? The court holding that it did not dismissed the complaint. All facts were stipulated including many of the controverted facts in this case. Surely the court must be held to have misconstrued

the various dicta as authoritative when in fact not so. Can anything contained in a case not necessary to the decision be other than dicta and is dicta ruling? Appellants contend not.

VIII.

THE COURT WAS IN ERROR IN HOLDING THAT APPLICABLE PROVISIONS OF THE UNITED STATES INTERNAL REVENUE CODE ARE INCOME TAX LAWS WITHIN THE MEANING OF SECTION 31 OF THE ORGANIC ACT OF GUAM (1421i T 48 U.S.C.A.) SUBJECT TO NON-SUBSTANTIVE CHANGES IN NOMENCLATURE (Point 15).

The plain meaning of this section is as clear as if after the end was reproduced in its entirety so much of Title 26 U.S.C.A. as pertains to income tax. The canons of statutory construction hold this; so also does the often forgotten rule of reason.

Now, therefore, what purpose will it serve to make “non-substantive changes in nomenclature”? Where is the authority or need for any change? We know of none.

Further, what is non-substantive, what does change of nomenclature mean? If this is so, who is to change it? What standards are there for these changes? How far may they go? Where has there been any delegation of any authority to anyone to make these changes and who has the power to decide when they are necessary? It would seem to appellants that this holding of the District Court is both a legal as well as a logical absurdity.

The statute says the United States income tax laws—just that, no more, no less. If they are altered, changed or re-written, they are not the United States income tax laws, but some other, possibly similar, laws. But in such event, they violate the statute, i.e., Chap. 8A, Title 48 U.S.C.A. They are now, when changed, different laws.

The statute does not say the income tax laws of Guam; it says the United States. To change or alter these statutes by one word is to exercise legislative power and functions. This is forbidden by the Constitution to not only the executive but to the courts. Such a power cannot be granted or delegated by the Congress to anyone.

Federal Trade Commission v. Raladam Company, 75 L.Ed. 1324.

“Official Powers cannot be extended beyond the terms and necessary implications of the grant. If broader powers be desirable they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions.”

Hawke v. Commissioner of Internal Revenue, 109 F.2d 946.

“Nor do we agree to this suggestion. Departmental regulations may not invade the field of legislation, but must be confined within the limits of congressional enactment. *Commissioner v. Van Vorst*, 9 Cir., 1932, 59 F.2d 677, 679, and cases cited therein.”

*Opp. Cotton Mills, Inc. v. Administrator of
the Wage and Hour Division of the Depart-
ment of Labor*, 85 L.Ed. 624.

“The mandate of the Constitution that all legislative powers granted ‘shall be vested’ in Congress has never been thought to preclude Congress from resorting to the aid of administrative officers or boards as factfinding agencies whose findings, made in conformity to previously adopted legislative standards or definitions of congressional policy, have been made prerequisite to the operation of its statutory command. The adoption of the declared policy by Congress and its definition of the circumstances in which its command is to be effective, constitute the performance, in the constitution sense, of the legislation function.

“But where, as in the present case, the standards set up for the guidance of the administrative agency, the procedure which it is directed to follow and the record of its action which is required by the statute to be kept or which is in fact preserved, are such that Congress, the courts and the public can ascertain whether the agency has conformed to the standards which Congress has prescribed, there is no failure of performance of the legislative function. The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct. Those essentials are preserved when Congress specified the basic conclusion of fact upon ascertainment of which, from relevant data by a designated administrative agency, it ordains that its statutory command is to be effective.”

However, is there not a reason for everything. Is there not a compelling reason for the court and the Government of Guam to attempt to substantiate such a premise. The United States Income Tax Laws provide not only the rate of tax, the method for administration, all procedures including appellate and also spell out in detail who has the authority and how such authority shall be exercised.

If the clear command of the statute is obeyed, we then have the Income Tax Laws of the United States administered by the same United States officials, in accordance with the standards and rules long established in use elsewhere and there is no room for local interpretation or alteration.

If a local tax can be read into the plain words of the statute, then local officials have, they assert, the authority to interpret and enforce it according to their own notions. They will not have to provide all the steps and procedures contained in the United States statute. Anything may be omitted as nomenclature.

This fact was admitted by Mr. Otto at the hearing on the motion when he said there are no appellate procedures, no review is possible, no tax court. Yet all of this presumably is minor changes in nomenclature.

Clearly the court erred in holding that administrative officers or anyone else but the United States Congress can alter, amend or change a statute of the United States. To do so is neither administrative action or minor. It is legislation and void.

IX.

THE COURT ERRED IN FAILING TO RECOGNIZE THE EXISTENCE OF SERIOUS QUESTIONS INVOLVING CONSTITUTIONAL LAW, THE APPLICATION OF THE BILL OF RIGHTS FOR GUAM, AND OF STATUTORY CONSTRUCTION (Point 16).

The court fell into error and closed its mind to the existence of numerous grave questions raised in this case; among them appellants briefly indicate a few:

First and foremost, the court refused to recognize the question of the unconstitutional delegation or exercise of the legislative powers reserved to the Congress.

Second, the court failed to see that the question of due process of law enters into this case at all.

Third, the court was unaware of any possibility of the Section in question violating the constitutional mandate against vagueness and lack of standards. The court refused to consider any possibility of the illegal imposition of a tax by implication and the void addition to an act of Congress by any action except that of the Congress.

The court refused to notice the enforcement of withholding contrary to the terms of the United States statutes.

The court refused to see the attempted enforcement of a Federal Statute and the use of remedies exclusively reserved to the United States by unauthorized persons and contrary to the provisions of Title 26 U.S.C.A.

The court failed to notice the effective deprivation of the equal protection of the laws alleged in the complaint.

The court cannot see any violation of the Federal Civil Rights Laws under claim of territorial authority and under and by virtue of the color of office by these defendants.

Appellants contend that all these enumerated important questions are clearly set forth in their complaint, that at the argument upon the motion and by the files in the action all were called to the attention of the court and that the court, ignoring their existence, was in error.

X.

THE COURT ERRED IN FAILING TO COMPLY WITH THE MANDATORY PROVISIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE AND IN FAILING TO REQUIRE COMPLIANCE BY THE DEFENDANTS WITH THE SAME MANDATORY RULES (Point 17).

One rule ignored by the court is Rule 15(a) which provides that at any time before a responsive pleading is served, any party may amend once as a matter of course. A motion is not a responsive pleading, yet appellants were denied the right to amend. T.R. p. 104.

“Mr. Phelan. We could add an amendment to this complaint.

The Court. I have to take this complaint as it is. I have a motion for summary judgment before me. I have got your motion for summary judgment. You are through on this complaint.”

Appellants contend this was error and deprived them of a substantial right.

The court did not heed the requirements of either Rule 36 or Rule 56 and did not require compliance by the defendants with the same rules.

The court accepted defendant Kennedy's answer to the request for admission which contrary to Rule 36 was signed and verified by defendant Taitano.

The court failed to require defendants to make proper objections to the requests for admissions and permitted them to be evasive and deliberately flaunt the spirit of the rule.

The court refused to give heed to the requests for admission treating every matter adduced or presented by appellants as set forth on page 85 of the transcript as window dressing. In effect, you are wasting your time. This matter does not require anyone to adhere to the rules.

Appellant contends that the total and consistent disregard of the Civil Rules was not only error but deprived the appellants of their constitutional right to a fair hearing, and because of this error the judgment should be reversed.

CONCLUSION.

Appellants believe that the District Court of Guam was in numerous instances in error in this action, are of the opinion that various ones have been pointed out in this brief, and that these errors require reversal. Not wishing to belabor the points, and a wealth of error leads to confusion, appellants are

convinced that the errors herein are most clearly apparent from consideration of the transcript of the proceedings.

Appellants conclude that the judgment of the District Court of Guam should be reversed, that the defendants be required to answer the complaint, and that the action should proceed to a trial.

Dated, Agana, unincorporated territory of Guam,
28 March 1955.

Respectfully submitted,

FINTON J. PHELAN, JR.,

Attorney for Appellants.

No. 14,593

IN THE
United States Court of Appeals
For the Ninth Circuit

JOHN WILSON, LEONARD WHITE, PAUL
BOGOVICH, and ELIZABETH TINTORRI,
Appellants,

VS.

B. L. KENNEDY, FORD Q. ELVIDGE,
HOWARD D. PORTER, and RICHARD
F. TAITANO,
Appellees.

Appeal from the Judgment of the District Court of Guam.
Civil Case No. 27-54.

BRIEF OF APPELLEES.

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FILED

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No. 14,593

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JOHN WILSON, LEONARD WHITE, PAUL
BOGOVICH, and ELIZABETH TINTORRI,
Appellants,

VS.

B. L. KENNEDY, FORD Q. ELVIDGE,
HOWARD D. PORTER, and RICHARD
F. TAITANO,
Appellees.

Appeal from the Judgment of the District Court of Guam.
Civil Case No. 27-54.

BRIEF OF APPELLEES.

REPORT CITATION OF OPINION BELOW.

The opinion of the District Court of Guam from which this appeal is taken (R. 71-77) is reported in 123 F. Supp. 156.

JURISDICTION.

This case was instituted by a complaint filed in the District Court of Guam seeking a money judgment

against the appellees—the defendants below—for income taxes paid to the Government of Guam under Section 31 of the Organic Act of Guam, Act of August 1, 1950, c. 512, Section 31, 64 Stat. 383, 392, 48 U.S.C., Section 1421i, an injunction against further enforcement of the tax, and a declaratory judgment.

The District Court of Guam is the court of general jurisdiction for the Unincorporated Territory of Guam. Section 22 of the Organic Act of Guam, Act of August 1, 1950, c. 512, Section 22, 64 Stat. 383, 389, 48 U.S.C., Section 1424.

The District Court of Guam entered a summary judgment in favor of the defendants, from which appellants—the plaintiffs below—have taken this appeal.

Jurisdiction is conferred on this Court by 28 U.S.C., Sections 1291 and 1294, as amended by the Act of October 31, 1951, c. 655, Sections 48 and 50(a), 65 Stat. 710, 726, 727.

HISTORY.

This is an appeal from the judgment of the District Court of Guam entering a summary judgment in favor of the defendants-appellees.

The complaint was filed in the District Court against four officials of the Government of the Territory of Guam, as individuals, the former Commissioner of Revenue and Taxation, the Governor, the Attorney General, and the Director of Finance, to

recover income taxes for the years 1951, 1952, and 1953, collected pursuant to Section 31 of the Organic Act of Guam, 48 U.S.C., Section 1421i, to secure an injunction against further enforcement of the tax by the defendants, and to obtain a declaratory judgment that Section 31 of the Organic Act does not create a separate territorial income tax.

Instead of answering, defendants filed a motion to dismiss and for summary judgment.

Plaintiffs countered with a request for admissions of fact and a cross-motion for summary judgment.

After hearing and argument, the District Court granted defendants' motion for summary judgment.

Plaintiffs have appealed.

STATEMENT OF THE CASE.

The purpose of this case is to secure the overruling of the decision in *Laguana v. Ansell*, 102 F. Supp. 919, affirmed by this Court, 212 F. 2d 207, writ of certiorari denied, 348 U.S. 830, 75 S. Ct. 51, 99 L. Ed. 32.

The *Laguana* case holds that Section 31 of the Organic Act of Guam, 48 U.S.C., Section 1421i, 64 Stat. 383, 392, in providing that

“The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam,”

creates a separate territorial income tax to be enforced by the territorial government of Guam. The tax had been so enforced since its effective date¹ relying on a 1951 United States Treasury ruling.²

To attack the *Laguana* decision two types of taxpayers have joined in the complaint (R. 3-13). Plaintiffs Wilson and White are employees of Brown-Pacific-Maxon, a contracting firm doing business in Guam, and seek a judgment for the taxes withheld by their employer from their wages during the years 1951, 1952 and 1953 and paid over allegedly to the defendants (R. 11). Plaintiffs Bogovich and Tintorri, as employers during the period 1951 to 1953, withheld income taxes from various unnamed employees in amounts not specified, and paid the same over allegedly to the defendants. They now ask that a refund be made of these amounts to such employees (R. 11). In all cases the sums so paid were actually paid into the Treasury of the Government of Guam in the regular collection of taxes by tax officials (R. 15-17, 66-69).

In addition to the personal judgment against the defendants in favor of plaintiffs Wilson and White, and the refund to the employees of plaintiffs Bogovich and Tintorri, plaintiffs ask in the complaint an injunction against enforcement of the territorial in-

¹Effective as of January 1, 1951 by provisions of Executive Order No. 10,211, February 6, 1951, 48 U.S.C.A., 1421i, Note, 16 F.R. 1167. See *Laguana v. Ansell*, 102 F. Supp. 919, 920.

²I. T. 4046, 1951, 1 Cum. Bull. See *Laguana v. Ansell*, supra, at p. 922 of 102 F. Supp.

come tax and a declaratory judgment that, among other points, Section 31 of the Organic Act of Guam does not create a separate territorial income tax and no officer of the government of Guam is authorized to collect any territorial income tax (R. 12).

The defendants, appellees in this Court, are as follows:

B. L. Kennedy, Commissioner of Revenue and Taxation, Government of Guam, March 27, 1953 to April 28, 1954;

Richard Taitano, Director of Finance, Government of Guam, May 14, 1952 to date;

Ford Q. Elvidge, Governor of Guam, April 23, 1953 to date;

Howard D. Porter, Attorney General of Guam, August 31, 1953 to date (R. 66, 70).

Although these defendants have been sued as individuals, the acts performed by them which constitute the alleged cause of action set forth in the complaint consist of nothing more than the enforcement in their official capacities of Section 31 of the Organic Act of Guam on the theory that it creates a separate territorial income tax.

Though plaintiffs use throughout the complaint the terms "coerce," "threaten" and "illegal" in describing the activities of the defendants, no facts are stated, as distinguished from legal conclusions, indicating any act which would be improper or illegal if done pursuant to a separate territorial income tax law. There are no allegations of negligence or malice.

Plaintiffs expressly allege that the taxes collected have been disposed of for the "benefit and use of the unincorporated territory of Guam." (R. 6, 7). It was also so conceded at the hearing (R. 94, 110).

On June 9, 1954 defendants filed a motion to dismiss and for summary judgment (R. 14), together with affidavits by defendant Elvidge and defendant Taitano in support thereof (R. 15-17).

Before the motion came up for hearing, plaintiffs filed identical requests for admissions of fact against each defendant on July 20, 1954 (R. 19-49), consisting of 109 alleged statements of fact, many of which have numerous sub-statements so that the total number is actually 357.

Also on July 20, 1954 plaintiffs gave notice that they would file a cross-motion for summary judgment (R. 50).

Defendants filed identical replies to the separate requests for admissions of fact on August 26, 1954 (R. 66-70), and at the same time identical objections to most of the requests (R. 59-65). Hearing on the objections was set for August 27, 1954 at 9:30 a.m., the same time as the hearing on the motion of defendants and cross-motion of plaintiffs (R. 70a).

At the hearing on August 27, 1954 the District Court overruled defendants' motion to dismiss (R. 111, 117) and took under advisement the motions for summary judgment (R. 115, 117). The minute entry of the clerk does not show a ruling on defendants' objections to the requests for admissions (R. 117), but

the remarks of the Court from the bench (R. 110) would indicate a disposition favorable to defendants:

“Now as to all these questions—I, of course, read the questions in the beginning. I do not agree with the plaintiffs, the nature of the questions or that they are proper.”

The District Court filed its opinion on August 31, 1954 (R. 71-77; also reported in 123 F. Supp. 156). The opinion follows the prior holding in the *Laguana* case that Section 31 of the Organic Act of Guam imposes a territorial income tax to be collected by the proper officials of the Government of Guam (R. 74). The Court summarizes its own holdings (R. 77, 123 F. Supp. at pages 159-160) as follows:

“1. Section 31 of the Organic Act of Guam imposes a territorial income tax to be paid to and collected by the proper officials of the Government of Guam.

“2. The Director of Finance is authorized as the tax collector in Guam to enforce and receive such taxes by himself or his appointees.

“3. The tax to be paid ordinarily is measured by the amount of income tax the taxpayer would be required to pay to the United States of America if the taxpayer were residing in the continental United States or its incorporated territories.

“4. The applicable provisions in the United States Revenue Code to enforce the payment of the territorial income tax are ‘income tax laws’ within the meaning of Section 31 and are available to the Director of Finance or to those author-

ized by him, subject to those non-substantive changes in nomenclature as are necessary to avoid confusion as to the taxing jurisdiction involved.”

QUESTIONS PRESENTED.

The questions presented are:

1. Whether the *Laguana* case, holding that Section 31 of the Organic Act of Guam imposes a territorial income tax, to be collected by the proper officials of the Government of Guam, should be overruled. This is the basic, fundamental question.

2. Whether the District Court erred in following the *Laguana* case and holding that Section 31 of the Organic Act of Guam imposes a territorial income tax to be paid to the proper officials of the Government of Guam.

3. Whether there is any constitutional issue presented on which plaintiffs are entitled to relief.

4. Whether the District Court erred in holding that the defendants, officials of the Government of Guam, particularly defendant Taitano as Director of Finance, and defendant Kennedy as Commissioner of Revenue and Taxation, are properly authorized to enforce the territorial income tax imposed by Section 31 of the Organic Act.

5. Whether the District Court erred in granting defendants' motion for summary judgment.

STATUTES AND RULES INVOLVED.

Organic Act of Guam, C. 512, 64 Stat. 383:

Section 6(b). "The Governor shall have general supervision and control of all executive agencies and instrumentalities of the government of Guam. He shall faithfully execute the laws of the United States applicable to Guam, and the laws of Guam. He may grant pardons and reprieves and remit fines and forfeitures for offenses against the local laws, and may grant respites for all offenses against the applicable laws of the United States until the decision of the President can be ascertained. He may veto any legislation as provided in this Act. He shall commission all officers that he may be authorized to appoint. He may call upon the commanders of the armed forces of the United States in Guam, or summon the posse comitatus, or call out the militia to prevent or suppress violence, insurrection, or rebellion; and he may, in case of rebellion, invasion or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place Guam, or any part thereof, under martial law until communication can be had with the President and the President's decision thereon communicated to the Governor. He shall annually, and at such other times as the President or the Congress may require, make official report of the transactions of the government of Guam to the head of the department or agency designated by the President under section 3 of this Act, and his said annual report shall be transmitted by such department or agency to the Congress. He shall perform such additional duties and functions as may, in pursuance of law, be

delegated to him by the President, or by the department or agency. He shall have the power to issue executive regulations not in conflict with any applicable law. The Governor may submit such recommendations for the enactment of legislation to the legislature as he shall consider to be in the people's interest." (48 U.S.C. 1952 Ed., Sec. 1422(b).)

Section 9(b). "The Governor may appoint or remove any officer whose appointment or removal is not otherwise provided for. All officers shall have such powers and duties as may be conferred or imposed on them by law or by executive regulation of the Governor not inconsistent with any law." (48 U.S.C. 1952 Ed., Sec. 1422c(b).)

Section 30. "All customs duties and Federal income taxes derived from Guam, the proceeds of all taxes collected under the internal-revenue laws of the United States on articles produced in Guam and transported to the United States, its Territories, or possessions, or consumed in Guam, and the proceeds of any other taxes which may be levied by the Congress on the inhabitants of Guam, and all quarantine, passport, immigration, and naturalization fees collected in Guam shall be covered into the treasury of Guam and held in account for the government of Guam, and shall be expended for the benefit and government of Guam in accordance with the annual budgets." (48 U.S.C. 1952 Ed., Sec. 1421h.)

Section 31. "The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam." (48 U.S.C. 1952 Ed., Sec. 1421i.)

Internal Revenue Code of 1939, c. 2, 53 Stat.,
Part I:

Section 3653(a). "TAX.—Except as provided in sections 272(a), 871(a) and 1012(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." (26 U.S.C. 1952 Ed., Sec. 3653 (a).)

Section 3772. Suits for Refund.

"(a) LIMITATION.—

"(1) CLAIM.—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

"(2) TIME.—No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates.

"(3) RECONSIDERATION AFTER MAILING OF NOTICE.—Any consideration, reconsideration, or action by the Commissioner with respect to such claim following the mailing of a

notice by registered mail of disallowance shall not operate to extend the period within which suit may be begun. This paragraph shall not operate (a) to bar a suit or proceeding in respect of a claim reopened prior to June 22, 1936, if such suit or proceeding was not barred under the law in effect prior to that date, or (b) to prevent the suspension of the statute of limitations for filing suit under section 3774(b) (2).” (26 U.S.C. 1952 Ed., Sec. 3772(a).)

Title 28 U.S.C. 1952 ed., Sec. 2201:

Section 2201. “CREATION OF REMEDY. In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964, amended May 24, 1949, c. 139, Section 111, 63 Stat. 105.”

Federal Rules of Civil Procedure:

Rule 36. “Admission of Facts and of Genuineness of Documents.

“(a) Request for Admission. After commencement of an action a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth in the request. If

a plaintiff desires to serve a request within 10 days after commencement of the action, leave of court, granted with or without notice, must be obtained. Copies of the documents shall be served with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such shorter or longer time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part, together with a notice of hearing the objections at the earliest practicable time. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party deny only a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder. As amended Dec. 27, 1946, effective March 19, 1948.

“(b) Effect of Admission. Any admission made by a party pursuant to such request is for the purpose of the pending action only and

neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.”

Rule 56. “Summary Judgment.

“(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As amended Dec. 27, 1946, effective March 19, 1948.

“(b) For Defending Party. A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

“(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. As amended Dec. 27, 1946, effective March 19, 1948.”

Rules of the United States Court of Appeals for the Ninth Circuit:

Rule 35. "Cases Involving Constitutional Question Where United States is not a Party. Notice to Court and to Attorney General. It shall be the duty of counsel who challenges the constitutionality of any Act of Congress affecting the public interest in any suit or proceeding in this court to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, upon the filing of the record to give immediate notice in writing to this court of the existence of said question, specifying the section of the statute to be construed. In all such cases the clerk of this court shall certify such fact to the Attorney General. (See 28 U.S.C. Sec. 2403.)"

SUMMARY OF ARGUMENT.

The District Court properly entered summary judgment for defendants on the basis of the prior *Laguana* decision.

The opinion of the District Court in the *Laguana* case, affirmed by this Court, holds that Section 31 of the Organic Act of Guam imposes a separate territorial income tax to be enforced by the proper officials of the Government of Guam.

In the present case the basic issue, therefore, is whether the *Laguana* decision should be followed or overruled on the basis of the facts presented.

Plaintiff Wilson and plaintiff White are seeking a refund of the taxes withheld from their wages by their employer, Brown-Pacific-Maxon, and paid to the Government of Guam. Plaintiff Bogovich and plaintiff Tintorri, who operate a business together, are asking that a refund be made to all their employees for taxes which they have withheld from such employees and paid to the Government of Guam. Neither the amount of such withholdings by these plaintiffs, nor the identity of their employees, is stated.

The ruling in the *Laguana* case is in point with regard to both classes of plaintiffs, since the *Laguana* case also involves the legality of the withholding of income tax from Laguana's pay by his employer. The decision holds that the withholding from Laguana's pay, and the payment thereof to the Government of Guam, was proper.

The contention of the plaintiffs that Section 31 of the Organic Act of Guam does not create a separate territorial income tax would reduce Section 31 to a complete nullity. As pointed out in the *Laguana* decision, the income tax laws have long applied to Guam, but the exemptions provided by Section 251 of the Internal Revenue Code of 1939 and earlier versions thereof had resulted in no taxes being paid on the bulk of all income earned in Guam. The express intent of Congress in enacting Section 31 was to tax this hitherto untaxed income.

The authority to enforce the separate territorial income tax created by Section 31 of the Organic Act

is in the Governor of Guam by his authority and responsibility under the Organic Act, Section 6(b), to enforce the laws of Guam and United States laws applicable to Guam. To aid him in the performance of his duties as the chief law enforcement officer of the Government of Guam, he can, of course, delegate to his subordinates. This is further evidenced by Section 9(b) of the Organic Act. Since the territorial income tax has been in effect, the actual enforcement thereof has been in the Department of Finance under the Director of Finance who in turn supervises his own subordinate, the Commissioner of Revenue and Taxation, in the enforcement of the income tax law.

Any local statutory implementation by the legislature of Guam is unnecessary, assuming Section 31 creates a separate territorial income tax. Congress has not seen fit to provide, expressly, that enforcement of the tax shall be dependent upon any local legislation. To read such a condition into the Organic Act would in effect put the legislature of Guam in the position of being able to frustrate the intent of Congress to impose a tax on income earned in Guam. In other words the legislature of Guam could veto a tax imposed upon Guam by Act of Congress by its refusal to provide the necessary implementation.

There is no constitutional issue present on which plaintiffs can base a claim for reversal. No facts are shown indicating any denial of due process since plaintiffs do not claim any discrimination or that the taxes collected from them for which refund is sought

are in excess of what they would pay in the United States. Nor have plaintiffs shown where there is any vagueness or lack of standards and how these plaintiffs have been harmed thereby.

The separate tax does not constitute an unconstitutional delegation of legislative powers, and in any event, the plenary powers of Congress with respect to government of territories and possessions would not preclude a vesting of legislative power in the executive branch of the government of a territory or possession.

The granting of the defendants' motion for summary judgment under Rule 56, and the denial of plaintiffs' cross motion, was proper and within the sound discretion of the District Court.

A summary judgment may be granted when there is no genuine issue as to any material fact. In filing the motion directed to the complaint of the plaintiffs, the defendants admitted for the sake of the motion all facts well pleaded in the complaint. No admission, of course, is made by such a motion with regard to conclusions of law that may be in a complaint. In the present complaint, such conclusions of law are numerous and generally state that Section 31 does not provide a separate territorial income tax, that there are no officials in the Government of Guam authorized to enforce the tax imposed by Section 31, that the defendants have no such authority, that the acts of the defendants in enforcing the tax are illegal, that the defendants coerced and threatened the plaintiffs

to pay the tax, and that actually the defendants are mere usurpers of the lawful authority of the United States tax officials.

It is obvious that these statements are not facts, but conclusions of law to be determined by the Court. Consequently, they are not admitted by the defendants in filing their motion.

The voluminous request for admission of facts filed by the plaintiffs, totalling in all some 357 items, including the sub-items, are similarly largely conclusions of law, or irrelevancies, or both. The defendants properly acknowledged certain factual items either entirely or in part with qualifications. As to the others, objections were duly filed and properly sustained.

The Director of Finance and his subordinate, the Commissioner of Revenue and Taxation, in enforcing the separate territorial income tax have the authority to make use of the various enforcement procedures in the United States Internal Revenue Code.

Since there is a separate territorial income tax, no suit can be maintained for a refund of any taxes paid unless a claim is first presented to the proper authorities, as indicated by Section 3772 of the Internal Revenue Code of 1939.

In addition the District Court has no jurisdiction to entertain any suit for an injunction against the enforcement of the tax, as indicated by Section 3653 of the Internal Revenue Code of 1939, nor for a declaratory judgment.

The purpose of this lawsuit is to seek a decision overruling the *Laguana* decision and in effect asks for an interpretation of Section 31 of the Organic Act of Guam which would completely frustrate the intent of the Congress of the United States to impose, as a separate territorial tax, the income tax laws of the United States on income earned in Guam.

ARGUMENT.

I.

THE BASIC QUESTION IN THIS CASE, WHETHER SECTION 31 OF THE ORGANIC ACT CREATES A SEPARATE TERRITORIAL INCOME TAX, HAS ALREADY BEEN DECIDED BY THIS COURT IN *LAGUANA v. ANSELL* IN FAVOR OF DEFENDANTS.

Section 31 of the Organic Act states:

“Section 31. The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam.”

The contention of the plaintiffs is that Section 31 of the Organic Act does not create a separate territorial income tax for the territory of Guam and that consequently the defendants have no authority to collect any such tax.

This basic legal issue of the case has already been ruled upon by this Court in *Laguana v. Ansell*, 102 F. Supp. 919, affirmed by this Court, 212 F. 2d 207, writ of certiorari denied, 348 U.S. 830, 75 S. Ct. 51, 99 L. Ed. 32.

In the *Laguana* case plaintiff Laguana sued defendant Ansell, the Acting Tax Commissioner and Acting Treasurer of the Government of Guam, for a refund of the tax withheld from his wages by his employer and paid into the Treasury of Guam.

The factual situation is thus identical with that of plaintiff Wilson and plaintiff White in the present appeal, who are suing the defendants for the amount of tax withheld from their wages by their employer, Brown-Pacific-Maxon, and paid into the Treasury of Guam.

The opinion of the District Court in the *Laguana* case, 102 F. Supp. 919, 920, states:

“The position taken by the taxpayer is that Sec. 31 made applicable to Guam the Federal income-tax laws as such, including any provisions granting exemptions from taxation on income derived from sources within possessions of the United States, 26 U.S.C.A. Sections 251 and 252.

“The position taken by the governments is that the effect of Sec. 31 is to set up a separate income-tax system for Guam which is a duplicate of the Federal income-tax system; that the United States Congress in exercising its authority to legislate for the unincorporated territories and possessions has established a separate and distinct taxing jurisdiction which contemplates collection of the tax by territorial officials for the use and benefit of the inhabitants of the territory; that in the alternative the taxpayer cannot be heard to complain in the instant case as the tax was owing and reached the eventual source for which it was intended.

“It seems to me that it is little more than va-grant intellectual exercise to assume that in these days of great challenge the United States Congress intended by Sec. 31 to do less than impose the full burden of income taxation, measured by the Federal tax, in this unincorporated territory. Even the very limited discussion indicates that the Congress was fully aware of the fact that it was taxing those who may have previously come within one or more of the exemptions in 26 U.S.C.A. Sections 251 and 252.

“The United States Treasury Department has construed Sec. 31 as establishing a territorial tax to be administered by the officials of the Guam government and the United States supports that holding. 1951-6-13559, I.T. 4046. The taxpayer has therefore complied with the instructions of both governments in meeting his tax liability and his tax has covered into the treasury of Guam. He cannot now be heard to say that the tax should be returned to him in order that it be paid to the United States and returned to the Guam treasury from which it was taken. The case of *Stone v. White*, 301 U.S. 532, 57 S. Ct. 851, 81 L. Ed. 1265, disposes of any such contention.

“The question remains as to whether Sec. 31 imposes a Federal tax to be collected by the United States or a territorial tax to be collected by the Government of Guam.

. . .

“As the governments point out, however, in those instances when Congress has made the income-tax laws in force in the United States ap-

plicable to possessions it has in the two major instances of the Philippines and Puerto Rico directed that such tax was to be collected by the territorial governments; and the courts have held that the effect of such legislation was to levy a territorial tax. *Lawrence v. Wardell*, 9 Cir., 273 F. 406; *Robinette v. Commissioner of Internal Revenue*, 6 Cir., 139 F. 2d 285. Later both the Philippines and Puerto Rico were given authority to adopt their own income-tax laws.

“The Naval Appropriations Act of 1921, 42 Stat. 122, 123, contained the following proviso: ‘That the income tax laws now in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in the Virgin Islands of the United States, *except that the proceeds of such taxes shall be paid into the treasuries of said islands.*’ (Italics supplied.)

“It does not appear that this proviso has been the subject of reported litigation but the United States Treasury construed it in its opinion I.T. 2946 (C.B. X14-2, 109 (1935)) as establishing separate and distinct taxing jurisdictions although their income-tax laws arose from an identical statute applicable to each. In its opinion I.T. 4046, 1951-6-13559 is similarly construed Sec. 31, *supra*, as establishing a separate territorial tax in Guam and that Section 251(a) of the Internal Revenue Code is applicable insofar as taxes due the United States are involved.

“Regardless of my initial view that Sec. 31 imposed a Federal tax to be collected by the United States, I believe that I shall add to any existing confusion by persisting in that view in

the light of the position taken by the governments involved and my conviction that in any event a tax is imposed. I hold that the effect of Sec. 31 is to impose a territorial tax to be collected by the proper officials of the Government of Guam.”

This Court affirmed the decision of the District Court, 212 F. 2d 207, by stating:

“PER CURIAM.

“For the reasons given in the Court’s opinion filed February 29, 1952, 102 F. Supp. 919, the judgment is affirmed.”

Plaintiffs do not expressly ask that Laguana be overruled but attempt to limit its application by saying that the District Court misconstrued its own opinion (Plaintiffs’ Brief, 72), and that the opinion only holds the complaint does not state a claim on which relief could be granted and all else is dicta (Plaintiffs’ Brief, 32-33, 72).

But the fact that Laguana’s complaint did not state a claim upon which relief could be granted is the heart of the matter. His complaint failed for a very good reason—he was asking for a refund of his tax from an official of the Government of Guam on the erroneous ground that Section 31 did not create a separate territorial tax and hence defendant Ansell had no authority to collect it. The District Court held that this theory of the law was improper and ruled against him and this Court affirmed the decision.

Plaintiffs’ brief belabors at length the point (Plaintiffs’ Brief, 55-63) that the “major vice of the

entire position of the Government” is I.T. 4046 (Plaintiffs’ Brief, 55). Much stress is laid on the scant respect that is due such an Income Tax Unit Ruling. Many cases are quoted (Plaintiffs’ Brief, 58-63) to the effect that Internal Revenue regulations and rulings must be consistent with statutory authority.

It is submitted, however, that this argument does not prove plaintiffs’ contentions. The cold fact remains that it is not I.T. 4046 which is the precedent governing this case, but the decision of the District Court and this Court in the *Laguana* case.

Plaintiffs in arguing for their own interpretation of Section 31, namely, that the United States income tax laws are to be in effect in Guam and be enforced by officials of the United States, state this is a “practicable, workable system” (Plaintiffs’ Brief, 70), and “a complete system of income taxation” (Plaintiffs’ Brief, 71), whereas the tax as it is presently being enforced with the sanction of the *Laguana* decision is a result of “reading into the United States statutes and the statutes of Guam that which neither the Congress nor the (Guam) legislature saw fit to put there.” (Plaintiffs’ Brief, 63.)

Plaintiffs fail to mention that their interpretation of Section 31 would reduce it to a legislative non-entity. It would merely be a declaration of existing law. The income tax laws of the United States, as a United States tax, applied to Guam long before Section 31 was enacted. However, with regard to income earned in Guam an exemption was provided

by Section 251 of the United States Internal Revenue Code of 1939,³ as is pointed out in the *Laguana* opinion. The purpose of Section 31 of the Organic Act, as shown in the legislative history recited in the *Laguana* opinion, was to tax this income which was previously exempt from the United States income tax by virtue of Section 251. Yet plaintiffs are in effect saying that this purpose was not accomplished by Section 31, that Section 31 was a futile gesture and did not accomplish the intent of Congress, and that it merely was declarative of existing law.

Plaintiffs' references to what the Guam legislature saw fit to enact (Plaintiffs' Brief, 63) and to the alleged "admission" by defendants' counsel that there has been no legislation enacted by the Government of Guam with reference to the territorial income tax (Plaintiffs' Brief, 28, 29, 53) are equally without merit.

As stated in the *Laguana* opinion, 102 F. Supp. 919, 921:

"When the Congress imposes a tax of this nature it intends that it shall be collected."

Accordingly, the tax as enacted must have been intended by Congress to be complete in itself, ready to be enforced by the executive authorities of Guam. It cannot be presumed Congress intended to create a vacuum—impose a tax but say no one is authorized to collect it. Consequently, no action by the Guam legislature was necessary to put the tax into effect.

³Section 931, Internal Revenue Code of 1954.

Nor could any action by the Guam legislature repeal the tax so imposed or preclude its enforcement.

If Congress desired to withhold the enforcement of Section 31 as a separate territorial income tax until implementing legislation by the Guam legislature was enacted,⁴ it could have done so. In the absence of any express limitation, no such condition can be assumed. Otherwise the Guam legislature would have a veto over the power of Congress to enact a tax for Guam. The express intent of Congress with regard to Section 31 would thereby be frustrated.

II.

PLAINTIFFS' CONTENTION THAT THERE ARE NO VALID TAX ENFORCEMENT AUTHORITIES IN THE GOVERNMENT OF GUAM IS UNWARRANTED.

Throughout plaintiffs' complaint, requests for admissions of fact and brief, the contention is repeatedly made that the defendants have no authority to enforce the tax imposed by Section 31 of the Organic Act.

⁴An example of where Congress enacted a tax statute for a possession and specifically gave the local government authority to implement it is contained in *Ricardo v. Ambrose*, 211 F. 2d 212, involving a Virgin Islands real estate tax, 49 Stat. 1372, 48 U.S.C.A., Sections 1401-1401e. It is also interesting to note that the Virgin Islands, which has had the same type of income tax law as Guam, Act of July 12, 1921, c. 44, Sec. 1, 42 Stat. 123, 48 U.S.C. 1952 Ed. Sec. 1397, has apparently never implemented the Federal statute by local legislation. Letter, Governor of Virgin Islands to Director, Office of Territories, Department of the Interior, November 16, 1954; letter, United States Attorney, Virgin Islands, to Acting Attorney General, June 3, 1954. (Reproduced in Appendix to Defendants' Brief.)

This claim, however, is based primarily on the erroneous theory that Section 31 does not create a separate territorial income tax but instead is merely declarative of the fact that the United States income tax applies in Guam as a Federal tax. Hence the defendants are alleged in the complaint to have "usurped" the duties and authority of the Commissioner of Internal Revenue of the United States (R. 8).

Once the correctness of the decision in the *Laguana* case is conceded, namely, that Section 31 creates a separate territorial tax to be enforced by the officials of the Government of Guam, the issue as to lack of authority and the consequent alleged illegality of the defendants' enforcement activities necessarily fails.

Nowhere do the plaintiffs expressly allege or claim that, granting for the sake of argument that Section 31 does create a separate territorial tax, the defendants are still not authorized to enforce it.

The authority to enforce the separate territorial income tax created by Section 31 of the Organic Act is also contained in the Organic Act, Section 6(b), 48 U.S.C., Section 1422(b), which provides:

"The Governor shall have general supervision and control of all executive agencies and instrumentalities of the government of Guam. He shall faithfully execute the laws of the United States applicable to Guam, and the laws of Guam . . ."

Section 31 and the entire Organic Act is, in the broad sense, a law of the United States "applicable to Guam." Further, in creating a separate territorial income tax, Congress by Section 31 has enacted a local

law for Guam under its power to legislate directly for territories and possessions. In this sense the territorial income tax is a "law of Guam":

First National Bank v. Yankton (1880) 101

U.S. 789, 25 L. Ed. 1046;

United States v. Pridgeon (1894) 153 U.S. 48,

14 S. Ct. 746, 38 L. Ed. 631;

Ex Parte Krause (DC ND Wash., 1915) 228

F. 547;

United States v. Sloan (DC Mont., 1945) 61 F.

Supp. 439;

United States v. Wright (DC Hawaii, 1954)

15 F.R.D. 184.

The Governor of Guam, in carrying out his duties to enforce the law, can unquestionably delegate to other officials and subordinates of the executive branch of the government.

This authority is recognized in the Organic Act, Section 9(b), 48 U.S.C., Section 1422c(b):

"The Governor may appoint or remove any officer whose appointment or removal is not otherwise provided for. All officers shall have such powers and duties as may be conferred or imposed on them by law or by executive regulation of the Governor not inconsistent with any law."

Since the inception of the separate territorial income tax under Section 31 of the Organic Act, its enforcement has been delegated to the Director of Finance. Affidavits of defendant Elvidge (R. 15-16) and defendant Taitano (R. 16-17). Within the De-

partment of Finance, enforcement of the income tax has been the primary duty of the Commissioner of Revenue and Taxation. Affidavit of defendant Taitano (R. 16-17).

The plaintiffs contend that the only authorized functions of the Commissioner of Revenue and Taxation are under the Business Privilege Tax Law (Plaintiffs' Brief, 2-3, 63) and quote the pertinent provisions of that law (Plaintiffs' Brief, 20-21).

Actually the Business Privilege Tax Law, an enactment of the Guam Legislature, Title XX, Chapter 6, Government Code, Public 43, 2d Guam Legislature, July 22, 1953, is entirely irrelevant as far as the territorial income tax under Section 31 of the Organic Act is concerned. The Business Privilege Tax Law does not purport to create the position of Commissioner of Revenue and Taxation, as indicated in the very sections quoted by plaintiffs (Plaintiffs' Brief, 20-21), but recognizes it as an office already in existence. It is obviously clear that the Commissioner can and does have other duties than those given him under the Business Privilege Tax Law, and those are primarily, under the Director of Finance, the enforcement of the territorial income tax.

Plaintiffs also mention (Plaintiffs' Brief, 28, 53) the so-called "admission" by defendants' counsel in response to a query by the District Court that there are no local statutory enactments, that is enactments by the Guam legislature, authorizing any department, agency, or official of the Government of Guam to collect the territorial income tax. As previously pointed

out in Part 1 hereof, pages 26, 27, any such implementation is unnecessary, and if it were necessary it would mean that Congress, without any expression to that effect, had given the Guam Legislature a veto power over whether or not the income tax imposed by Section 31 should go into effect.

Actually, of course, as mentioned *supra*, the Governor has the primary authority of enforcing the income tax by virtue of Section 6(b) of the Organic Act.

III.

IT IS SUBMITTED THAT THE CONSTITUTIONAL POINTS
RAISED BY PLAINTIFFS ARE WITHOUT MERIT AND
DO NOT WARRANT THE OVERRULING OF *LAGUANA v.*
ANSELL.

The constitutional points mentioned by plaintiffs (Plaintiffs' Brief, 77) with regard to the proper interpretation of Section 31 were not brought up in the *Laguana* case but may be considered here.

A. As to due process.

As far as due process is concerned the decision in the *Laguana* case disposes of the question.

There is no allegation or affidavit that the taxes collected, for which refunds are sought, are not correct in amount, or that there is any question of the liability of the plaintiffs to the Government of Guam, assuming Section 31 of the Organic Act creates a separate tax.

But since the *Laguana* decision has decided that Section 31 does create a separate tax, the question

of due process as to these plaintiffs is not in issue. The District Court was correct in so ruling at the hearing (R. 113).

Even if there were some question as to the authority of the individual defendants to collect the taxes from the plaintiffs, the fact that Section 31 creates a separate tax and that the tax so collected reached the proper destination, namely, the Government of Guam, there still would be no issue of due process raised entitling plaintiffs to a refund, under the principle of *Stone v. White* (1937), 301 U.S. 532, 57 S. Ct. 851, 81 L. Ed. 1265, cited at page 921 of the *Laguana* decision.

Similarly there is no specific allegation of "vagueness" or "lack of standards" or of how any such vagueness or lack of standards would in any way affect the amount of plaintiffs' taxes or plaintiffs' liability therefor.

So, also, with regard to plaintiffs' mention that the Government of Guam has not established a Guam Tax Court or other form of appellate review (Plaintiffs' Brief, 29, 76). This is not in issue in the present case, as the District Court ruled (R. 75), 123 F. Supp. at 159, since no question is raised as to the amount of plaintiffs' taxes or plaintiffs' liability therefor once the separate tax theory is established.

B. As to delegation of legislative powers.

Plaintiffs also assert (Plaintiffs' Brief, 77, 29-30) that the "first and foremost" constitutional question

is that of delegation or exercise of legislative powers reserved to Congress. This point is further developed in Part VIII (Plaintiffs' Brief, 73-76) with reference to the District Court's decision that in applying the United States income tax laws as a territorial tax, the term "Guam" may be read for "United States" in certain places (R. 75) and that there may be made "non-substantive changes in nomenclature as are necessary to avoid confusion as to the taxing jurisdiction involved." (R. 77.)

It is submitted that no delegation or use of legislative powers is involved here. The tax officials of the Government of Guam, in enforcing the territorial income tax, consisting as it does of the United States income-tax laws, must of necessity read the law with substituted terminology appropriate to its function as a local Guam tax law if it is to have any meaning and if the intent of Congress is to be carried out. This does not, of course, mean that the tax officials can act arbitrarily or according to their own whims and fancies. They must follow the definite standard that Congress intended that Guam taxpayers shall pay, to the Government of Guam, the same tax on income earned in Guam that taxpayers living in the United States would pay to the United States on income earned in the United States.

Plaintiffs' complaint contains a general allegation as to these matters in paragraph XII (R. 8), but no specific instances are set forth.

Even assuming Section 31 of the Organic Act entails a delegation of legislative power, would such

delegation be invalid when it is given to the executive branch of a possession?

In setting up governments for the possessions of the United States, Congress is not restricted to any specific form of government and is not necessarily obliged to follow the three-fold division of powers. Congress has plenary powers in governing possessions, *First National Bank v. Yankton*, supra. If it desires it may establish a local government with a local legislature and give such legislature local legislative authority, but Congress is not obliged to do so and if it desires, Congress may give legislative authority to some other branch of the local government.

Thus for many years the Territory of Alaska had no legislature. Guam itself, until the Organic Act was passed, was under the Department of the Navy. The Naval Governor had plenary powers—legislative and judicial as well as executive.

In establishing the territory of Oklahoma, Congress expressly vested legislative power in the governor as well as in the legislature. Act of May 2, 1890, c. 182, Sec. 4, 26 Stat. 81, 83.

At times Congress has also vested legislative powers in the judiciary, as in the District of Columbia and Territory of Alaska:

Keller v. Potomac Electric Power Co. (1923)
261 U.S. 428, 442, 43 S. Ct. 445, 448, 67 L.
Ed. 731;

In re Annexation of Slaterville (DC Alaska
1949) 83 F. Supp. 661.

It is submitted that if Section 31 of the Organic Act involves any delegation of legislative power by Congress to the executive branch of the Government of Guam, it is constitutional.

Plaintiffs' reference (Plaintiffs' Brief, 30) of an "attempted delegation by the Commissioner of Internal Revenue of the United States" seems entirely irrelevant. There has been no delegation by the Commissioner with reference to Section 31.

C. Failure of plaintiffs to comply with Rule 35 of this court.

Although plaintiffs have challenged the constitutionality of Section 31 of the Organic Act, as interpreted in the *Laguana* decision, it is pointed out that they have failed to comply with Rule 35 of this Court:

"Notice to Court and to Attorney General. It shall be the duty of counsel who challenges the constitutionality of any Act of Congress affecting the public interest in any suit or proceeding in this court to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, upon the filing of the record to give immediate notice in writing to this court of the existence of said question, specifying the section of the statute to be construed. In all such cases the clerk of this court shall certify such fact to the Attorney General. (See 28 U.S.C. Sec. 2403.)"

IV.

**THE DISTRICT COURT PROPERLY GRANTED DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT.****A. Introductory.**

Parts I, II and III of this brief are concerned with the basic issues of this appeal concerning the merits of plaintiffs' case. It has been shown that the District Court followed the *Laguana* decision in holding that Section 31 of the Organic Act of Guam imposes a separate territorial income tax to be enforced by the Government of Guam, and that the defendants, the appellees, are the proper officials charged with enforcement.

B. The District Court did not dismiss the complaint and then thereafter grant the motion for summary judgment.

Plaintiffs assert (Plaintiffs' Brief, 27, 28, 39) that the District Court first dismissed the complaint and then granted summary judgment for defendants. Their argument is "Once the complaint was dismissed, there was nothing before the court; the court had nothing upon which to act." (Plaintiffs' Brief, 39.)

Plaintiffs are under an erroneous impression. At the hearing on the motion the District Court first clearly said: "I will overrule your motion to dismiss," (R. 111), referring to defendants' motion to dismiss the complaint. Subsequently the District Court stated: "I will prepare a written opinion and will rule on the question of summary judgment since both of you have moved for summary judgment." (R. 115.) This is further shown by the minute entry of the hearing (R. 117).

- C. Since there was no genuine issue as to any material fact, the District Court was correct in granting defendants' motion for summary judgment.

Rule 56, concerning the granting of a summary judgment, provides in part:

"The judgment shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Was there any "genuine issue as to any material fact?" If not, it was proper for the District Court to dispose of the case on matters of law.

It is fundamental, of course, that by moving for dismissal and for summary judgment, defendants admit the allegations *of fact* in the complaint are true for the purposes of the motion. Conclusions of law, however, are in nowise admitted.

Thus, in *Rosenhan v. United States* (CA 10, 1942) 131 F. 2d 932, certiorari denied, 318 U.S. 790, 63 S. Ct. 993, 87 L. Ed. 1156, the Court ruled:

"The motion for judgment on the pleadings admits all facts well pleaded, but it does not admit conclusions of law. The Government therefore admits the issuance of a certificate of airworthiness on the aircraft by the Utah State Aeronautics Commission, but it does not admit the legal conclusion that such a certificate met the requirements of the Civil Aeronautics Act, *supra*, requiring a certificate of airworthiness. Neither does the motion admit the affirmative defense of

the asserted unconstitutionality of the Act as applied to the admitted intrastate operations.”

However, as far as facts are concerned, as distinguished from conclusions of law, the complaint is in effect alleging that defendants have been enforcing a separate territorial income tax pursuant to Section 31 of the Organic Act. This the defendants not only admit but assert is their obligation as officials of the Government of Guam.

The complaint even alleges the official positions of the defendants with the Government of Guam (R. 4).

With regard to defendant Kennedy the complaint, however, merely states he has “been holding himself out to be the Commissioner of Revenue and Taxation of the unincorporated territory of Guam, claiming to have been duly appointed to such office pursuant to law with the power and duty to collect a territorial income tax.”

It is a matter of law, as shown in Part II of defendants’ brief, that the Governor has the power and duty to enforce Federal laws applicable to Guam and the laws of Guam under Section 6(a) of the Organic Act, which necessarily includes the separate territorial income tax created by Section 31. The affidavits of defendant Elvidge, the Governor of Guam (R. 15-16), and of defendant Taitano, the Director of Finance (R. 16-17), were filed in support of defendants’ motion to clarify the fact that this power and duty of the Governor was being enforced through the Director of Finance and Commissioner of Revenue and Taxation.

When then is there a “*genuine* issue as to any *material* fact?”

Plaintiffs’ recital of allegations (Plaintiffs’ Brief, 37), which they claim are admitted as being true for the purposes of the motion, is a recital of conclusions of law:

(a) “The complaint alleged the taxes to be illegal, the demands of defendants also illegal, T.R. 4, 5.” (Plaintiffs’ Brief, 37.)

Whether the tax is “illegal” is a matter of interpretation of Section 31. The “demands” apparently refer to alleged demands by defendants for payment of tax. The legality of such demands also is a question of interpreting Section 31. There is no allegation of facts that the amount of taxes paid by plaintiffs is excessive, assuming Section 31 creates a separate territorial income tax.

(b) “That the sums collected have been converted by defendants, T.R. 7.” (Plaintiffs’ Brief, 37.)

This is a reference to Paragraph IX of the complaint (R. 7). Whether the collection of taxes by the defendants through normal procedures and the turning over of such funds to the Government of Guam is a “conversion” again depends upon the interpretation of Section 31 and is a question of law.

(c) “That defendants have usurped the authorities of the Commissioner of Internal Revenue of the United States, T.R. 8, and have altered and amended the Internal Revenue Code of the United States.” (Plaintiffs’ Brief, 37.)

Whether the defendants are illegally enforcing a Federal tax or are rather merely administering a separate territorial income tax under Section 31 is a question of law.

(d) "That defendants have no statutory authority, T.R. 9." (Plaintiffs' Brief, 37.)

This is apparently a reference to Paragraphs XII, XIV and XV of the complaint (R. 8, 9). This raises again only questions of law. With regard to the lack of statutory enactments by the Guam Legislature referred to in Paragraphs XIV and XV, while this is a question of law, it has also been expressly stated by defendants. There is no question here of any "admission." As pointed out in Part II of this brief, the Guam Legislature is not required to enact legislation as a condition to the enforcement of a tax imposed on Guam by the Congress of the United States.

(e) "That plaintiffs are deprived of their property without due process of law, T.R. 10."

Again this is a conclusion of law depending on whether Section 31 creates a separate territorial income tax. No question is raised otherwise as to the correctness of the tax.

Similarly the statements (Plaintiffs' Brief, 39-40) referring to allegations of lack of authority by defendant Taitano, the Department of Finance, defendant Elvidge, and defendant Kennedy do not raise any material question of fact.

The statement (Plaintiffs' Brief, 40), "The complaint alleges illegal threats of action both civil and

criminal”, again turns on the point “illegal.” The allegations as to threats and coercion refer only to routine enforcement of the separate territorial income tax, the propriety of which depends upon the interpretation of Section 31, a legal question.

Part III (Plaintiffs’ Brief, 42-45) is a further repetition of various allegations in the complaint and issues raised which plaintiffs assert are questions of fact but which are actually questions of law.

In Part IV (Plaintiffs’ Brief, 45-49) plaintiffs argue that the District Court should have overruled the objections by the defendants to the requests for admissions of fact. The requests for admissions (R. 19-49), of which there are a total of 357 items, including the numerous sub-items, are primarily a mass of conclusions of law and irrelevancies which ask the defendants to confess judgment by admitting that there is no territorial income tax and that whatever tax is imposed by Section 31 of the Organic Act, the defendants have no authority to enforce it.

Rule 36 is clear in expressly indicating that it provides only for admissions of “*relevant matters of fact*” and not of law.

Rule 36 is also so interpreted in *Fidelity Trust Co. v. Village of Stickney* (CA 7, 1942) 129 F. 2d 506, where the court ruled that a request for an admission that certain village bonds which had been cancelled had not been used to pay property assessments was a request for a conclusion of law and improper. The Court pointed out at page 511 that the requested admission was a question in litigation:

“Under the plaintiff’s construction of the statute, it (payment) was unauthorized. To ask the defendant to admit the property owners had not used bonds to pay their assessments and that the cancelled bonds were not paid and cancelled, was not a request for facts but a conclusion of law, and that was the heart of the case.”

In addition to the conclusions of law, a host of the requests are entirely irrelevant to the question of whether plaintiffs are entitled to judgment and refund of the taxes paid by them, as indicated in the objections filed by defendants (R. 59-65).

D. Contrary to the statement in plaintiffs’ brief (Plaintiffs’ Brief 46), defendants did seek a ruling on objections to request for admissions and the District Court properly sustained the objections.

Plaintiffs’ assertion (Plaintiffs’ Brief, 46) that defendants violated Rule 36 by not seeking a ruling on their objections to the requests for admissions of fact is not in accordance with the record.

Defendants gave notice on August 26, 1954 that a hearing would be had on the objections on August 27, 1954 in conjunction with the hearing on the motion to dismiss and for summary judgment (R. 70a).

The objections are also mentioned in the statement of defendants’ counsel (R. 84) at the hearing on August 27, 1954 as to the questions before the Court.

While the Court’s minute entry for the hearing (R. 117) does not give its ruling on the objections of the defendants, it is submitted they were sustained by the Court when the judge of the District Court stated (R. 110):

“Now as to all these questions—I, of course, read the questions in the beginning. I do not agree with the plaintiffs, the nature of the questions or that they are proper.”

The propriety of the District Court's ruling on the objections cannot be justifiably questioned. The bulk of the 357 items and sub-items (R. 19-49) call for conclusions of law or are entirely irrelevant as to whether the plaintiffs are entitled to the relief they request, based on the taxes paid by them.

E. It was proper for the District Court to enter summary judgment in favor of defendant Kennedy even though his reply to the request for admissions was sworn to by defendant Taitano.

It is contended (Plaintiffs' Brief, 42) that the District Court erred in entering summary judgment in favor of defendant Kennedy because his reply (R. 66-70) to plaintiffs' request for admissions of fact was not sworn to by him but by defendant Taitano.

Rule 36 does not require that the sworn statement made in response to request for admissions must be signed by the party to the action. This was specifically held in *Van Horne v. Hines, Adm'r of Veteran Affairs* (DC Dist. Col., 1940) 31 F. Supp. 346:

“The rule does not indicate that a sworn statement when served shall be signed by the adverse party. It is considered sufficient for the purpose and spirit of the rule if such sworn statement be made by one who knows or upon information believes the truth of matters stated therein.”

Defendant Richard Taitano was certainly qualified to swear to defendant Kennedy's reply since the material pertains to the operation of the Department of Finance of which he is Director. In addition defendant Taitano's reply is identical with that of defendant Kennedy's (R. 70).

V.

SINCE SECTION 31 OF THE ORGANIC ACT CREATES A SEPARATE TERRITORIAL INCOME TAX, PLAINTIFFS, NOT HAVING FILED A CLAIM FOR REFUND, FAILED TO LAY THE FOUNDATION FOR A SUIT FOR REFUND.

In their prayer plaintiff Wilson asks for a judgment for a refund of \$2,613.60 and plaintiff White for a judgment for a tax refund of \$2,871.20. In addition plaintiffs Bogovich and Tintorri ask for a refund of all taxes withheld by them for various unnamed employees without stating any amount (R. 11-12).

Since there is created a separate territorial income tax for Guam under Section 31 of the Organic Act, consisting of the applicable provisions of the United States income tax laws, it was necessary for plaintiffs to make a proper demand for refund before the District Court would have jurisdiction to entertain a suit for refund.

Section 3772⁵ of the United States Internal Revenue Code of 1939 specified two conditions precedent before the jurisdiction of the District Court could be invoked:

⁵Section 7422, Internal Revenue Code of 1954.

“Section 3772. Suits for refund.

(a) Limitations.

(1) Claim. No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

“(2) Time. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates.”

Plaintiffs have failed to allege compliance with these conditions in their complaint, and hence in any event the District Court would not have had jurisdiction to grant the judgments prayed for:

Harvey v. Early (CA 4, 1947) 160 F. 2d 836;
United States v. Felt & Tarrant Mfg. Co.
 (1931) 283 U.S. 269, 51 S. Ct. 376, 75 L. Ed.
 1025;

Kales v. United States (CA 3, 1940) 115 F. 2d
 497, affirmed (1941) 314 U.S. 186, 62 S. Ct.
 214, 86 L. Ed. 132.

VI.

SINCE SECTION 31 OF THE ORGANIC ACT CREATES A SEPARATE TERRITORIAL INCOME TAX, THE DISTRICT COURT WOULD NOT HAVE JURISDICTION TO GRANT THE INJUNCTIVE RELIEF PRAYED FOR.

In their prayer plaintiffs demand that the defendants be enjoined and restrained from further illegal levy, assessment and collection of the territorial income tax (R. 12).

Since Section 31 of the Organic Act creates a separate territorial income tax for Guam, consisting of the applicable provisions of the United States income tax laws, the District Court would have no jurisdiction to grant the injunctive relief prayed for.

Section 3653⁶ of the United States Internal Revenue Code of 1939, 26 U.S.C., 1952 Ed., Section 3653, provided:

“(a) Tax. Except as provided in Sections 272(a), 871(a) and 1012(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.”

Because of this provision the District Court would not have jurisdiction to grant injunctive relief:

Harvey v. Early (CA 4, 1947) 160 F. 2d 836.

The primary purpose of this section is to prohibit suits which will interfere with assessment and collection of taxes which are necessary to the maintenance of government:

⁶Section 7421, Internal Revenue Code of 1954.

Cadwalader v. Sturgess (CA 3, 1924) 297 F. 73;

Voss v. Hinds (DC WD Okla., 1953) 111 F. Supp. 679, affirmed (CA 10, 1953) 208 F. 2d 912.

The courts have held that Section 3653 of the 1939 Code, or its predecessors, applies where the assessment is alleged to be illegal, and even where the tax statute is alleged to be unconstitutional:

Dodge v. Osborn (1916) 240 U.S. 118, 36 S. Ct. 275, 60 L. Ed. 557;

Bailey v. George (1922) 259 U.S. 16, 42 S. Ct. 419, 66 L. Ed. 816;

Graham v. DuPont (1923) 262 U.S. 234, 43 S. Ct. 567, 67 L. Ed. 965;

Harvey v. Early (CA 4, 1947) 160 F. 2d 836;

Dyer v. Gallagher (CA 6, 1953) 203 F. 2d 477;

Robique v. Lambert (DC ED La., 1953) 114 F. Supp. 305, affirmed (CA 5, 1954) 214 F. 2d 3.

VII.

**INSOFAR AS PLAINTIFFS SEEK A DECLARATORY JUDGMENT,
THE DISTRICT COURT WOULD NOT HAVE JURISDICTION
TO GRANT THE RELIEF PRAYED FOR.**

Insofar as plaintiffs ask for a declaratory judgment (R. 12) as to the interpretation of Section 31 of the Organic Act, the District Court would not have jurisdiction by virtue of 28 U.S.C., Section 2201.

This precise point was already ruled upon in *Crain v. Government of Guam* (DC Guam, 1951) 97 F.Supp. 433, affirmed by this Court on other grounds, 195 F. 2d 414. The District Court's opinion states, at page 434:

“The purpose of the action is to obtain a declaratory judgment to the effect that the Government of Guam has no authority to impose or collect a tax under the provisions of Sec. 31, *supra*, but that this section must be construed in relationship to other applicable provisions of the United States Internal Revenue Code, 26 U.S.C.A. Section 1 *et seq.*; that any tax imposed by Sec. 31 is the concern of the United States Government and not the Government of Guam. Even assuming that the Government of Guam had waived its immunity from suit, this court would not take jurisdiction. As was stated in *Noland v. Westover*, 9 Cir., 172 F. 2d 614, 615: ‘The only definite relief asked is for a declaratory judgment, but the statute authorizing the district court to render a declaratory judgment does not authorize its application in controversies in respect of tax problems. 28 U.S.C.A. Section 2201; *Red Star Yeast and Products Co. v. La Buddle*, 7 Cir., 83 F. 2d 394; *Wilson v. Wilson*, 4 Cir., 141 F. 2d 599.’ ”

VIII.

PLAINTIFFS BOGOVICH AND TINTORRI CANNOT SUE FOR REFUND TO THEIR EMPLOYEES.

In addition to other defenses, plaintiff Bogovich and plaintiff Tintorri state no cause of action with

regard to the refund claimed on behalf of their employees.

These employees are not named in the complaint. The amount of refund claimed is not stated. There is no allegation that these unknown employees ever have objected to the withholding from their wages, or dispute the legality of the separate territorial income tax.

It would appear that these plaintiffs are in effect gratuitous interlopers.

These plaintiffs, as employers, are expressly exempted from any liability to their employees by Section 1623 of the Internal Revenue Code of 1939,⁷ 26 U.S.C., 1952 ed., Section 1623:

“The employer shall be liable for the payment of the tax required to be deducted and withheld under this subchapter, and *shall not be liable to any person for the amount of any such payment.*” (Emphasis added.)

IX.

PLAINTIFFS' POINT 12 AS TO THE CAPACITY IN WHICH DEFENDANTS HAVE BEEN SUED IS WITHOUT FOUNDATION.

In Part VI of their brief (Plaintiffs' Brief, 63-67) it is argued as Point 12 that the District Court erred in holding “that the defendants were sued in their official capacities.” Plaintiffs seem to argue (Plaintiffs' Brief, 63) that this somehow results in the defense of sovereign immunity.

⁷Section 3403, Internal Revenue Code of 1954.

Whatever impression the plaintiffs' counsel may have received at the hearing (R. 114-115), it is clearly stated in the opinion (R. 72), 123 F. Supp. 156, 158:

“The defendants are sued as individuals, but they are the former Commissioner of Revenue and Taxation for Guam, and the present Governor, Attorney General, and Director of Finance for Guam, respectively.”

In no way is the decision of the District Court based on sovereign immunity.

X.

THE DISTRICT COURT DID NOT ERR IN NOT PERMITTING PLAINTIFFS TO AMEND THEIR COMPLAINT.

The contention (Plaintiffs' Brief, 78) that the court erred in not allowing the plaintiffs to file an amended complaint is without merit.

The question arose as follows (R. 104):

“Mr. Phelan. I doubt that the tax court would take jurisdiction of the question.

The Court. But that is not before me. The only time it comes before me is when somebody wants to use that machinery and it doesn't exist. In other words, I am not at this time required to pass upon the question as to whether the Government of Guam can substitute an arbitrary administrative opinion for a judicial opinion, which the Congress of the United States authorizes and requires in connection with collections

in the United States. It seems to me that is a question which has to be raised at the proper time and proper proceedings.

Mr. Phelan. We could add an amendment to this complaint.

The Court. I have to take this complaint as it is. I have a motion for summary judgment before me. I have got your motion for summary judgment. You are through on this complaint."

Plaintiffs never submitted an amended complaint for filing, but in any event it is difficult to see how the tax court question could be raised in the present case. This is a suit for refund of taxes paid, raising the primary question of whether Section 31 of the Organic Act creates a separate territorial tax to be enforced by the proper officials of the Government of Guam. The question of whether there is a tribunal to review a tax assessment is irrelevant.

There certainly is no question of the availability of procedures to sue for refund of taxes paid. The *Laguana* case was a suit for refund.

It is submitted plaintiffs were in no way prejudiced by the ruling of the Court.

CONCLUSION.

It is submitted that the *Laguana* decision clearly governs the facts set forth in plaintiffs' complaint, and that the granting of defendants' motion for summary judgment by the District Court of Guam is

proper. It is requested that the decision of the District Court be affirmed.

Dated this 29th day of June, 1955.

Respectfully submitted,

HOWARD D. PORTER,

Attorney General of Guam,

LOUIS A. OTTO, JR.,

Deputy Attorney General of Guam,

LEON D. FLORES,

Island Attorney of Guam,

RICHARD ROSENBERRY,

Deputy Island Attorney of Guam,

Attorneys for Appellees.

(Appendix Follows.)

Appendix.

Appendix

Government of The Virgin Islands of the United States

Charlotte Amalie, St. Thomas

November 16, 1954

Honorable William C. Strand
Director, Office of Territories
Department of the Interior
Washington 25, D. C.

Mr dear Director Strand:

This is in response to your letter of November 9, 1954, requesting certain information regarding the enforcement of the Income Tax Laws in the Virgin Islands.

In enforcing the Income Tax Laws in the Virgin Islands, we have never had to apply the criminal provisions of the Internal Revenue Code. If such action becomes necessary, our proceedings will be based on the Federal law, since we do not have any territorial laws implementing the Federal law.

Sincerely,

A. A. Alexander

Governor

United States Department of Justice

United States Attorney
Virgin Islands of the United States
Charlotte Amalie, V. I.

June 3, 1954

Honorable Louis A. Otto, Jr.
Acting Attorney General
Government of Guam
Agana, Guam

My dear Mr. Otto:

This is in reply to your letter of May 24, 1954, requesting information covering the collection of income tax in this jurisdiction under Section 1397, Title 48 U.S.C.A.

Ever since the income tax laws of the United States became applicable to the Virgin Islands they have been enforced under the provisions of the United States Internal Revenue Code. The Commissioner of Finance was designated the Collector of Internal Revenue by the Governor of the Virgin Islands and an office set up administratively to administer and collect the tax. No local legislation has been passed to implement in any way the procedure in the collection of the tax, criminal or civil. The only thing which is done locally is to set up in the annual budget a certain amount for the purpose of refunding overpayment of taxes.

It is my opinion that it would be advisable for you to operate solely under the income tax laws of the

United States than to supplement them by any local laws. I do not think any such law will improve on the Federal law and whatever is necessary to be done with respect to the establishment of an office to collect and administer the tax may be done administratively.

Hoping this information will be of service to you and with kindest regards, I am

Sincerely yours,

/s/ Cyril Michael

Cyril Michael

United States Attorney

No. 14,593

IN THE
United States Court of Appeals
For the Ninth Circuit

JOHN WILSON, LEONARD WHITE, PAUL
BOGOVICH, and ELIZABETH TINTORRI,
Appellants,
vs.

B. L. KENNEDY, FORD Q. ELVIDGE,
HOWARD D. PORTER, and RICHARD
F. TAITANO,
Appellees.

On Appeal from the District Court of Guam
for the Unincorporated Territory of Guam.

APPELLANTS' REPLY BRIEF.

FILED

AUG - 2 1955

PAUL P. O'BRIEN, CLERK

FINTON J. PHELAN, JR.,
Suite 201-203, Mesa Building,
First Street West, Agana, Guam,
Attorney for Appellants.

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**United States Court of Appeals
For the Ninth Circuit**

JOHN WILSON, LEONARD WHITE, PAUL
BOGOVICH, and ELIZABETH TINTORRI,

Appellants,

VS.

B. L. KENNEDY, FORD Q. ELVIDGE,
HOWARD D. PORTER, and RICHARD
F. TAITANO,

Appellees.

**On Appeal from the District Court of Guam
for the Unincorporated Territory of Guam.**

APPELLANTS' REPLY BRIEF.

JURISDICTION AND STATEMENT OF THE CASE.

These have been adequately covered in appellants' opening brief and the appellees' reply brief.

STATUTES AND OTHER AUTHORITIES.

Statutes:

Title 48, USCA 1421c. Certain laws continued in force; modification or repeal of laws; applicability of Acts of Congress.

* * * * *

(b) Except as otherwise provided in this chapter, no law of the United States hereafter

enacted shall have any force or effect within Guam unless specifically made applicable by Act of the Congress either by reference to Guam by name or by reference to "possessions". The President of the United States shall appoint a commission of seven persons, at least three of whom shall be residents of Guam, to survey the field of Federal statutes and to make recommendations to the Congress of the United States within twelve months after August 1, 1950 as to which statutes of the United States not applicable to Guam on such date shall be made applicable to Guam, and as to which statutes of the United States applicable to Guam on such date shall be declared inapplicable. Aug. 1, 1950, c. 512, §25, 64 Stat. 390.

* * * * *

Section 25, Organic Act.

* * * * *

Title 48, USCA 1421f. Title to property transferred.

* * * * *

(b) All other property, real and personal, owned by the United States in Guam, not reserved by the President of the United States within ninety days after August 1, 1950,

* * * * *

Section 28, Organic Act.

* * * * *

Executive Order No. 10178, Oct. 31, 1950, 15 F.R. 7313

Reservation of Property in Guam for Use of United States

Now Therefore, by virtue of the authority vested in me by the said section 28 of the Organic

Act of Guam (this section), and as President of the United States, it is ordered as follows:

1. The following described real and personal property of the United States in Guam is hereby reserved to the United States and placed under the control and jurisdiction of the Secretary of the Navy:

Provided, That the Secretary of the Navy shall transfer such portions of such property to the Department of the Army, the Department of the Air Force, and the Coast Guard as may be required for their respective purposes:

(a) All of that real property in Guam situated within the perimeter areas defined in the following-designated condemnation proceedings in the Superior Court of Guam, being the same property quitclaimed by the Naval Government of Guam to the United States of America by deed dated July 31, 1950, and filed for record with the Land Registrar of Guam on August 4, 1950 (Presentation No. 22063):

* * * * *

3. In addition to the personal property described in paragraph 1 (e) hereof, there is hereby reserved to the United States all personal property of the United States in Guam, except that which is transferred to the government of Guam by or pursuant to section 28 (a) of the Organic Act of Guam (subsection (a) of this section), which on the date of this order, Oct. 31, 1950, is in the custody or control of the Department of the Army, the Department of the Navy, the Department of the Air Force, the Coast Guard, or any other department or agency of the United States; and all such personal property shall re-

main in the custody and control of the department or agency having custody and control thereof on the date of this order (Oct. 31, 1950).

* * * * *

Title 48, USCA § 1421 K. Designation of naval or military reservations; closed port.

Nothing contained in this chapter shall be construed as limiting the authority of the President to designate parts of Guam as naval or military reservations, nor to restrict his authority to treat Guam as a closed port with respect to the vessels and aircraft of foreign nations. Aug. 1, 1950, c. 512, § 33, 64 Stat. 393.

* * * * *

Section 33, Organic Act.



I.

APPELLANTS' ANSWER TO APPELLEES' POINT I.

Appellees contend that the *Laguana* case has conclusively decided the basic question to wit that a separate territorial tax has been created by the Organic Act; that the facts in that case and this one are the same, therefore, the issues are settled. Appellees very carefully fail to see, or admit, if they do see, two major differences. First, in the *Laguana* case he stipulated that Ansell was the duly constituted officer to collect this tax—a fact here in issue. Second, that the *Laguana* case is only *res judicata* as to Laguana and his privies. The two cases are not identical.

The appellees quote at length from that case which relies upon a supposed identity of situation between Guam and the Virgin Islands, yet set forth in italics on page 23 of their brief are the very words which spell out a vast difference.

One may be pardoned for agreeing with the learned District Judge quoted at the foot of page 23 and top of page 24 of the appellees' brief. It cannot be gainsaid but that truly he has constructed a monumental edifice of confusion.

Appellees, despite their claim, do in fact base their whole position upon IT 4046 which either construes a statute without any legal authority to do so, if not to be enforced by the United States Treasury or abdicates a mandatory statutory duty if the power to construe exists. This is the real basis for the elaborate opinion in the *Laguana* case.

The position of appellees on page 25 of their brief that the contentions of the appellants reduce Section 31 to a nonentity is specious and an error when read in connection with Section 25 b, this section is a necessary saving clause.

Appellees' counsel did contrary to the implications of their brief, page 26, admit that no local statutory exists, T.R. 101, 102.

The numerous plays upon words by the appellees throughout this entire controversy—their half-truths, implications, and unfounded assumptions have been, as never before, clearly demonstrated by the bill introduced in the session of the Third Guam Legislature as Bill No. 57, at the request of the appellee, Elvidge,

seeking to enact a territorial tax having the same text as the United States income tax.

Clearly, there is more to the question than merely whose law is this and who shall interpret it and enforce it. Why is the local government so determined to have within their hands and in the hands of these appellees the entire control of this tax? Can it be the lust for power of bureaucrats, or is it deeper and do they fear, as the devil does holy water, the administration and collection of this tax by the duly constituted officers of the United States?

Appellees fail and do not wish to see one vital basic question; one involving the very jurisdiction of the Government of Guam. Appellants Wilson and White are employed by Brown-Pacific-Maxon, a contractor of the United States, living on a United States naval reservation and earning their incomes there. These reservations were owned by the United States prior to the passage of the Organic Act and under the sole and exclusive jurisdiction of the United States, acting through the Department of the Navy, were reserved to the United States by Executive Order 10178 of 31 October 1950; pursuant to specific authority to so reserve contained in Sections 28 (b), and 33, of the Organic Act.

Is that the same factual situation as the *Laguana* case? Hardly.

II.

APPELLANTS' REPLY TO APPELLEES' SECOND POINT.

Contrary to the nebulous concepts of appellees, Section 31 of the Organic Act clearly refers to a United States tax and Section 30 grants to Guam United States taxes. It does not refer to territorial taxes. The statute is clear. It can be understood. Can appellees be sustained in their construction which does violence to the plain words of the statute? It is an United States statute in toto; nothing else.

Appellees in their argument bottom it in its entirety upon an assumption, and buttress that with dicta and a superficial construction of the pertinent statutes.

Appellees try to conceal from this court, in page 30 of their brief, that the provision of Title XX, Chapter 6, General Code of Guam, is a revision and codification of a statute existing prior to the enactment of the Organic Act of Guam and placed in force by executive order of the naval governor. Appellees further attempt to conceal the admissions made by Louis A. Otto, Jr., and Richard Rosenberry, T.R. 101, 102, who have signed their brief.

 III.

APPELLANTS' REPLY TO APPELLEES' POINT III.

A. Appellees attempt to gloss over lightly the question of due process, refuse to acknowledge that the case of *Stone v. White* must be distinguished

and the very obvious fact that one cannot point out specific portions of a secret and unknown law.

As to *Stone v. White*, the question was who, as between two parties, should pay a tax arising from one source to a tax collector of the United States. Here the question is: Can the officers of one government collect a tax under alleged authority of such government, but under the laws of another. Appellants see some difference.

Appellees want appellants to be specific, yet object strenuously to telling appellants, or anyone else, what changes, if any, they claim to have made in the text of the statute. Likewise, appellees attempt to gloss over the obviously clear fact that no standards exist or if they do are not made known to anyone except appellees. Likewise, the lack of any method of review of taxes alleged to be due and demanded by appellees though discussed by appellees at the hearing. Appellees claim there is no question of the amount of appellants' liability. Appellants claim this is no liability on their part, but one on the part of appellees.

B. Appellees are confused as to appellants' contention as to a delegation of the legislative power of the Congress. Appellants contend that IT 4046 is an attempt by the commissioner of internal revenue to construe the provisions of the Organic Act of Guam in such a way as to constitute in fact an unlawful delegation of the legislative power and that the acts of the appellees are, in fact, an unlawful usurpation of that power; that their argument on

pages 33-35 is a blatant admission of such fact and attempt to justify it.

The Congress did erect a local government of three branches with distinct and separate powers and what it did in Alaska, Oklahoma or elsewhere cannot alter that fact. It vested legislative power in the Guam Legislature, not in Mr. Elvidge or any of the appellees.

C. If the point raised by appellees be of merit, sufficient to say that appellee Elvidge is an officer of the United States, paid by the United States and by a United States Treasury check. Further, it is the interpretations and claims of appellees that are challenged, not the Organic Act.

IV.

APPELLANTS' REPLY TO APPELLEES' POINT IV.

Replying to appellees' Point B, the court did dismiss the complaint. T.R. 77.

In reply to appellees' point C, appellants believe it is sufficient to point out that while affidavits may show the existence or non-existence of a controverted fact, affidavits cannot contravene facts alleged in the complaint and they cannot be used to prove a fact in lieu of testimony. An argument cannot take the place of evidence and while counsel may admit, his statements and claims are not evidence, appellants' very brief clearly demonstrates that there are substantial issues of fact.

Appellees' attempt to hide behind verbal clouds the one salient fact which becomes clearer as time goes on that they do not intend to state what changes, if any, they claim have been made in the United States income tax law. That they will tell no one, not even this court, what is the text of the altered tax law they are attempting to create, one can only assume therefore that they, themselves, do not know. Thus this alleged tax, similar to all decrees and ukase of irresponsible bureaucrats and their ilk is a fluid thing to be twisted, altered and shifted to meet the whims of the moment. If this is not vague, indefinite and ambiguous nothing is.

No discussion of their approach to Rule 36 is necessary—that rule has a purpose; appellees do not intend to permit its effective use.

As to Point D. Nothing need be said; the record of the district court of Guam speaks for itself. Appellants contend there was no ruling or consideration given as to Point E. The position of appellees is fantastic and is contrary to the facts and logic. Appellee Kennedy did not deny specifically, as required by the rule, nor file the proper objections, in fact, neither did the other appellees.

The verification of Richard Taitano clearly shows that appellee Kennedy did not answer the requests himself and probably did not even know whether or not they were answered. Obviously, the answer was tailored by counsel and it is absurd that Kennedy can be assumed to make the identical answer of other appellees.

V.

APPELLANTS' REPLY TO APPELLEES' POINT V.

Appellees claim that this is a territorial tax, yet they cite as their authorities statutes which pertain solely to taxes of the United States. Appellants allude in passing to this for the purpose of showing the fundamental inconsistency and chaotic mental processes of the proponents of this Siamese twin tax, neither fish nor fowl, but good red herring.

We have here the attempt to juggle various concepts as suits the needs of the immediate situation. Appellants contend that appellees are in the same position of the person who wants to move in opposite directions at the same instant.

VI.

APPELLANTS' REPLY TO APPELLEES' POINT VI.

Again, appellants contend that appellees want to have their cake and also want to eat it. If, in fact, they have a territorial tax there is no inhibition of law preventing the district court from granting injunction relief. If the district court does not have such jurisdiction, appellees have no tax. In either event, their approach lacks realism and must fall.

VII.

APPELLANTS' REPLY TO APPELLEES' POINT VII.

Again, appellees attempt to have a territorial tax and secure the benefits of jurisdictional limitation that refer solely to federal taxes. It can't be both. If they, themselves, have not clarified their concepts as to this amazing creation, how can they be heard now to claim that appellants should not seek the aid of the only power capable of bringing order out of disorder, light into darkness, and logic into Guam.

VIII.

APPELLANTS' REPLY TO APPELLEES' POINT VIII.

Suffice to indicate that appellants Bogovich and Tintorri are required to collect a tax, that if not a federal tax they have no protection; that they claim withholding in any event is illegal in a possession and they are required to perform such illegal act by appellants. Appellants contend that this is a sufficient claim under the federal rules. An accounting can be had to determine the amounts due. A cause of action no longer need be stated as appellees contend.

IX.

APPELLANTS' REPLY TO APPELLEES' POINT IX.

Appellants understand that the only immunity a public official can have is by virtue of the sovereign's immunity and the needs of the sovereign to throw

the cloak of his immunity around his officers when acting within the scope of their authority on his business. That this goes as far as the scope of their duties but no further; that each public officer or servant is responsible for his own torts based, we believe, upon the basis principle that a tort cannot be within the scope of any officer's duties. Clearly, whether or not appellees and their counsel recognized the fact the district court did rely upon this principle and to no one's surprise did apply it. T.R. 114, 115.

X.

APPELLANTS' REPLY TO APPELLEES' POINT X.

No comment is believed necessary other than to say that the court erred unless upon no conceivable grounds could appellants so amend the complaint as to set forth a claim for relief. Upon the state of the record and the confused situation, coupled with the evasive tactics and unknown text of the alleged law, can any judge say that appellants could not set forth a claim? Appellants are curious as to what rules of procedure, if any, appellees refer to when they assert that an argument on a motion and before an answer was filed the amended complaint should be offered to the court and leave to file be obtained.

XI.

APPELLEES HAVE CONCEDED APPELLANTS' POSITION IN THIS CAUSE BY THE EXECUTIVE ACTION OF APPELLEE ELVIDGE SUBSEQUENT TO THE DOCKETING OF THIS APPEAL.

Appellees have contended consistently throughout this action, as well as in various others, that they possess all the statutory authority necessary to support and sustain their acts. That there exists a territorial income tax and that, therefore, there exists a complete system of taxation under the authority of which appellees justify their actions.

We have, for many years, observed the increased weight and respect accorded executive construction and determination in matters of government. Executive construction is held entitled to great weight principally because of the intimate association with the problem and the detailed and exhaustive knowledge of the executive.

On the thirteenth day of April, 1955, at the request of appellee Ford Q. Elvidge, there were caused to be introduced in the Third Guam Legislature, 1955 (First) Regular Session, bills numbered 28, 46, 57, and 78, as urgency measures and both necessary and vital to the territorial government. See Certificate of the Secretary of the Legislature, as set forth in Appendix, page i and purpose clauses of said bills, pages ii-v, inclusive.

Clearly, this is an admission that the asserted claims of the appellees that their alleged statutes are neither complete nor existent. These bills attempt to, after

this appeal was docketed, furnish the statutory basis for the position taken by appellees. They thus attempt, after several years, to now construct the foundation upon which their entire edifice has been allegedly standing for four long years. Can there be a more effective concession than this attempt to procure statutory authority at this late date, which appellants in this very action claim is, first, not necessary; and second, already exists.

Appellants contend that this clearly demonstrates the complete lack of substance of the claimed rights and authority of appellees and should be construed as a confession of errors. It can hardly be possible that appellees are attempting to create two taxes in the same amount and applying to the same people.

If, as contended by appellees, there exists the statutory authority for their actions and for their claimed offices and duties, surely these bills and their alleged need and purpose are unnecessary. Appellants assert that the introduction of these bills clearly demonstrates the existence of the allegations of the complaint and makes clear the lack of any authority upon the part of the appellees to act as they have claimed the right to and as they have acted. These bills, by their introduction, demolish the entire position of appellees.

Has not this action conceded the basic contention of appellants; to wit, that appellees possess no authority, have never possessed such authority, and have attempted by executive action to create a taxing statute without benefit of legislative action.

Appellants conclude that clearly this demonstrates the error of the district court of Guam and that the appellants should be required to answer the complaint upon the merits.

CONCLUSION.

Appellants assert that the district court of Guam should be reversed and that judgment for appellants should be directed, or that appellees should be required to answer the complaint upon the merits.

Appellants have consistently contended that there was no statutory authority for the action of appellees, that the claimed tax so long kept secret, is vague and ambiguous, lacks clarity and standards, and that there exists under the claims of appellees no safeguards of any sort. That this entire controversy is the result of the refusal of the appellees to admit the details of their claimed statute, to set forth the amendments and alterations they claim to have made, or to, in keeping with current concepts of jurisprudence as embodied in the federal rules, lay all the cards upon the table and have a cause decided upon the complete factual situation rather than upon the skillful play of words and the technics of a game of wits.

Appellants conclude that the records of this action and the briefs submitted completely sustain their

position and demonstrate the untenable one of appellees.

Therefore, the district court should be reversed.

Dated, Agana, Guam,

July 25, 1955.

Respectfully submitted,

FINTON J. PHELAN, JR.,

Attorney for Appellants.

(Appendix Follows.)

Appendix.

Appendix

Third Guam Legislature
Territory of Guam
(Seal)

F. B. Leon Guerro
Speaker

B. J. Bordallo
Vice-Speaker

A. B. N. Duenas,
Legislative Secretary

Rev. F. C. Flores
Chaplain

John A. Bohn
Counsel

Box 373, Agana, Guam,
7-332

April 13, 1955

Mr. E. R. Crain
Attorney-at-Law
Agana, Guam

Dear Mr. Crain:

Copies of Bills No. 28, 46, 57 and 78, Third Guam Legislature, are herewith forwarded in compliance with your letter of April 7th. All four bills were submitted to the Legislature by the Governor.

Very truly yours,

/s/ Maria C. Duenas

Maria C. Duenas

Executive Secretary

Enclosures (4)

Third Guam Legislature
1955 (First) Regular Session

Bill No. 28 Introduced by.....

Committee on Finance & Taxation, by request.

An Act to add Chapter 10, Title XX, to the Government Code of Guam, for the purpose of enabling other states, territories, and possessions of the United States, and their political subdivisions, to maintain suits in the District Court of Guam to recover taxes on a reciprocal basis, and for other purposes.

1 Be It Enacted by the People of the Territory
of Guam:

2 Section 1. There is hereby added to Title XX,
3 of the Government Code of Guam a new Chapter
10 to read as follows:

4 “Chapter 10

5 Reciprocal Tax Claims Act

6 Section 19800. Definitions. As used in this
Act:

* * * * * *

10 Section 2. This Act is urgency measure and
shall take effect

11 upon its approval by the Governor.

* * * * * *

Third Guam Legislature
1955 (First) Regular Session

Bill No. 57 Introduced by.....

Committee on Finance and Taxation, by request.

An Act to add Chapter 7 to Title XX of the Government Code of Guam, concerning the Guam Territorial Income Tax.

Be It Enacted by the People of the Territory of Guam:

* * * * * *

10 Section 19600.0. Authority of Department of Finance.

* * * * * *

3 Section 2. This Act is an urgency measure and shall take

4 effect upon the approval of the Governor.

* * * * * *

Third Guam Legislature
1955 (First) Regular Session

Bill No. 46

Introduced by.....

Committee on Finance and Taxation, by request.

An Act to clarify and add various enforcement provisions to the Business Privilege Tax Law. Chapter 6, Title XX, of the Government Code, by adding Sections 19527 and 19528, by repealing Subsection 19501.0206 of Section 19501 and adding Section 19529, by repealing Subsection 19501.0213 of Section 19501 and adding Section 19530, by amending Subsection 19566.01 of Sec-

tion 19566, by adding Subsection 19593.03 to Section 19593, by repealing present Subsection 19501.05 of Section 19501 and adding a new Subsection 19501.05 to Section 19501, by repealing present Section 19503 and adding a new Section 19503, by amending Sections 19504, 19506, 19510, and 19511, by amending Subsection 19513.04 of Section 19513, by adding Subsection 19513.08 to Section 19513, by amending Subsection 19541.0104 of Section 19541, by amending Section 19542, by amending Subsections 19543.08 and 19543.1010 of Section 19543, and to add Chapter 1 to Title XX of the Government Code, relative to the functions of the Director of Finance and the Commissioner of Revenue and Taxation, and for other purposes.

1 Be It Enacted by the People of the Territory
of Guam:

2 Section 1. Section 19527 is hereby added to
3 Chapter 6 Title XX, Government Code, as fol-
lows:

* * * * *

3 Section 19001. Commissioner of Taxation. There
4 shall be in the Department of Finance a Com-
5 missioner of Revenue and Taxation who shall
6 have such duties and powers as may be provided
7 by law or prescribed by the Director.

* * * * *

15 Section 20. This is an urgency measure and
shall take
16 effect upon its approval by the Governor.

* * * * *

Third Guam Legislature
1955 (First) Regular Session

Bill No. 78

Introduced by.....

Committee on Finance and Taxation, by request
An Act to add Chapter 8 to Title XX, Govern-
ment Code of Guam, to require the filing of copies
of the United States income tax returns under
certain conditions, and for other purposes.

1 Be It Enacted by the People of the Territory
of Guam:

2 Section 1. The following Chapter 8 is hereby
added to

3 Title XX, Government Code of Guam:

4 "Chapter 8

5 Copies of Federal Tax Returns

6 Section 1. Purpose. The purpose of this chap-
ter is to

7 aid the officials of the Government of Guam
8 in the prevention of tax evasion and thereby to
protect the revenues of the

9 Government of Guam.

* * * * *

33 Section 2. This Act is an urgency measure and
shall take

34 effect upon its approval by the Governor.

* * * * *

No. 14,593

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN WILSON, LEONARD WHITE, PAUL
BOGOVICH, and ELIZABETH TINTORRI,
Appellants,

vs.

B. L. KENNEDY, FORD Q. ELVIDGE, HOW-
ARD D. PORTER, and RICHARD F.
TAITANO,
Appellees.

Appeal from the Judgment of the District Court of Guam.
Civil Case No. 27-54.

SUPPLEMENTAL BRIEF OF APPELLEES.

HOWARD D. PORTER,

Attorney General of Guam,

LOUIS A. OTTO, JR.,

Deputy Attorney General of Guam,

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FILED

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IN THE

**United States Court of Appeals
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JOHN WILSON, LEONARD WHITE, PAUL
BOGOVICH, and ELIZABETH TINTORRI,
Appellants,

VS.

B. L. KENNEDY, FORD Q. ELVIDGE, HOW-
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TAITANO,
Appellees.

Appeal from the Judgment of the District Court of Guam.
Civil Case No. 27-54.

SUPPLEMENTAL BRIEF OF APPELLEES.

The attention of the court is invited to the fact that, subsequent to the filing of appellees' brief, Public Law 321 of the 84th Congress was approved on August 9, 1955, amending Section 3401 of the United States Internal Revenue Code of 1954, 26 U.S.C. 3401, to read:

“Sec. 3401. Definitions.

(a) Wages. For purposes of this chapter, the term ‘wages’ means all remuneration (other than

fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include remuneration paid—

* * * * *

(8) (A) for services for an employer (other than the United States or any agency thereof)—

(i) performed by a citizen of the United States, if, at the time of the payment of such remuneration, it is reasonable to believe that such remuneration will be excluded from gross income under section 911; or

(ii) performed in a foreign country *or in a possession of the United States* by such a citizen if, at the time of the payment of such remuneration, the employer is required by the law of any foreign country *or possession of the United States* to withhold income tax upon such remuneration; * * *” (Amendment to prior law indicated by italics.)

The effect of this amendment, adding the reference to “possession of the United States,” is to exempt from the United States withholding tax any income which is subject to withholding by a possession of the United States.

“Possession” includes, of course, the unincorporated territory of Guam. Section 25, Organic Act of Guam; 48 U.S.C., Section 1421c(b).

The legislative history of Public Law 321, shows that Senate Report No. 1244, July 29, 1955, of the Senate Committee on Finance accepted House Report

No. 1354, July 23, 1955, of the House Committee on Ways and Means, which states, in part:

“REASONS FOR BILL

Under present law the wages of a United States citizen employed in Puerto Rico or a possession of the United States may under certain circumstances be reduced by withholding for the income tax of Puerto Rico or the possession as well as for the Federal income tax. This is true even though eventually the foreign tax credit in these cases usually relieves the taxpayer of most or all of the Federal income tax liability. This has presented especially serious problems in the case of Puerto Rico although the problem also exists to a lesser extent in the case of the Virgin Islands *and Guam*. As a result of this double withholding, potential employees are reluctant to take jobs in Puerto Rico or the possessions. Moreover, the Internal Revenue Code already relieves United States citizens who perform services in a foreign country (for an employer other than the United States) from the withholding of the Federal income tax where withholding of a foreign income tax is provided.” (*Italics added.*)

1955 U. S. Code Congressional and Administrative News, No. 14, August 20, 1955, page 4294.

Here is direct and recent action by the Congress of the United States indicating approval of the decision in *Laguana v. Ansell* (DC Guam, 1952), 102 F. Supp. 919, affirmed (CA 9, 1954), 212 F. 2d 207, certiorari denied, 348 U.S. 830, 75 S. Ct. 51, 99 L. Ed. 32, cited

and quoted in appellees' brief, construing Section 31 of the Organic Act as creating a separate territorial income tax, including withholding provisions. The plaintiff, Laguana, sued for a refund of the amount of the tax withheld from his wages.

Such subsequent congressional action is certainly indicative that this Court in affirming the decision of the District Court of Guam in the *Laguana* case correctly interpreted the legislative intent with regard to Section 31 of the Organic Act. It directly refutes the contrary construction argued by appellants in Part VII of their opening brief, pages 67-73.

As stated in 50 Am. Jur. "Statutes" Section 337, at page 328:

"Subsequent Legislative Action.—The interpretation of a statute by the legislative department of the government may go far to remove doubt as to its meaning. This fact is recognized by the courts which regard it as proper, in determining the meaning of a statute, to take into consideration subsequent action of the legislature, or the interpretation which the legislature subsequently places upon the statute. There are no principles of construction which prevent the utilization by the courts of subsequent enactments or amendments as an aid in arriving at the correct meaning of a prior statute, and it is very common for a court, in construing a statute, to refer to subsequent legislation as impliedly confirming the view which the court has decided to adopt. Indeed, it has been held that if it can be gathered from a subsequent statute in *pari materia* what meaning

the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute.”

Dated, Agana, Guam,
November 10, 1955.

Respectfully submitted,

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Deputy Island Attorney of Guam,

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No. 14,595
IN THE
United States Court of Appeals
For the Ninth Circuit

JOHN P. MITCHELL,

Appellant,

v.

EDWIN B. SWOPE, Warden, United
States Penitentiary, Alcatraz, Cali-
fornia,

Appellee.

BRIEF FOR APPELLEE.

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No. 14,595

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JOHN P. MITCHELL,

Appellant,

v.

EDWIN B. SWOPE, Warden, United
States Penitentiary, Alcatraz, Cali-
fornia,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction is invoked under Sections 2255, 1294(1) and 2253 of Title 28 United States Code.

STATEMENT OF THE CASE.

Appellant filed a petition for a writ of habeas corpus on August 18, 1954, alleging that he was illegally confined by appellee. He contended that he was denied the effective assistance of counsel and that the members of the court which tried him were not sworn. This, he claimed, showed that the General Court Mar-

tial which tried him did not have competent jurisdiction over him or the subject matter on which he was tried.

On September 24, 1954 United States District Judge Edward P. Murphy obtained certified photostatic copies of the Board of Review No. 1, European Theater of Operations, dated 11 October, 1944, in the case of Private John P. Mitchell, the appellant herein. On September 27, 1954 Judge Murphy denied the petition for a writ of habeas corpus on the grounds that an examination of the record revealed the contentions of appellant "to be utterly without merit". Notice of appeal was filed on November 17, 1954 from Judge Murphy's order.

FACTS.

Appellant was tried by a General Court Martial convened at Tidworth, Wiltshire, England, in the European Theater of Operations, July 26, 1944 (R. 1).^{*} Appellant was charged with murder, carrying a concealed weapon and absence without leave (R. 2). He was convicted on all counts and dishonorably discharged and sentenced to a term of life imprisonment (R. 2). This term was modified to a sentence of twenty-one years by orders issued on March 8, 1946 and January 9, 1951 (R. 94, 95). The record of the reviewing authorities reveals that "Immediately following the arraignment the defense moved

^{*}The "R" numbers refer to page numbers on the photostatic copy of the record of the Board of Review.

for a continuance 'on the grounds that it has not had time to properly prepare its case. The case has been in its hands less than twenty-four hours.' The prosecution stated that the charges were served on accused 21 July 1944 (five days prior to the convening of the court, as confirmed by the charge sheet), that defense counsel examined the file 'about four days ago' and that trial on 26 July was required by military necessity. The court denied the motion'' (R. 2). This denial was upheld by the reviewing authority on October 11, 1944.

The Review Board found that the evidence at the trial "shows beyond a reasonable doubt that accused, angered at deceased because of his noise and the fact that he spoke to and was answered by accused's 'girl' in an unknown tongue, forced him outside the public house, stabbed him with the dagger . . . (R. 16)." The reviewing authority found "The court was legally constituted and had jurisdiction of the person and the offenses (R. 17)."

No facts were stated in the petition, and it does not appear from the record before the court that application was made to the Judge Advocate General for relief pursuant to Article of War 53.

QUESTIONS PRESENTED.

I. If the members of the court martial who tried petitioner were not sworn, would the court martial proceedings be void?

II. Did denying a continuance in appellant's case deprive the court martial of jurisdiction?

III. Did appellant exhaust his administrative remedies?

IV. Did petitioner state sufficient facts to require the trial court to issue an order to show cause or to issue a writ of habeas corpus?

STATUTES AND REGULATIONS.

Article of War 19 (10 U.S.C. 1490).

Section 1490. *OATHS* (*Article 19*). The trial judge advocate of a general or special court-martial shall administer to the members of the court, before they proceed upon any trial, the following oath or affirmation: "You, A B, do swear (or affirm) that you will well and truly try and determine, according to the evidence, the matter now before you, between the United States of America and the person to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear (or affirm) that you will not divulge the findings or sentence of the court until they shall be published by the proper authority or

duly announced by the court, except to the trial judge advocate and assistant trial judge advocate; neither will you disclose or discover the vote or opinion of any particular member of the court-martial upon a challenge or upon the findings or sentence, unless required to give evidence thereof as a witness by a court of justice in due course of law. So help you God.”

When the oath or affirmation has been administered to the members of a general or special court-martial the president of the court shall administer to the trial judge advocate and to each assistant trial judge advocate, if any, an oath or affirmation in the following form: “You, A B, do swear (or affirm) that you will faithfully and impartially perform the duties of a trial judge advocate, and will not divulge the findings or sentence of the court to any but the proper authority until they shall be duly disclosed. So help you God.”

All persons who give evidence before a court-martial shall be examined on oath or affirmation in the following form: “You swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you God.”

Every reporter of the proceedings of a court-martial shall, before entering upon his duties, make oath or affirmation in the following form: “You swear (or affirm) that you will faithfully perform the duties of reporter to this court. So help you God.”

Every interpreter in the trial of any case before a court-martial shall, before entering upon his duties, make oath or affirmation in the following form: "You swear (or affirm) that you will truly interpret in the case now in hearing. So help you God."

In the case of affirmation the closing sentence of adjuration will be omitted. (June 4, 1920, c. 227, subchapter II, Section 1, 41 Stat. 790.)

Article of War 53

Under such regulations as the President may prescribe, the Judge Advocate General is authorized, upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad conduct discharge previously executed a form of discharge authorized for administrative issuance, in any court-martial case in which application is made within one year after final disposition of the case upon initial appellate review: Provided, That with regard to cases involving offenses committed during World War II, the application for a new trial may be made within one year after termination of the war, or after its final disposition upon initial appellate review as herein provided, whichever is the later: Provided, That only one such application for a new trial may be entertained with regard to any one case: And pro-

vided further, That all action by the Judge Advocate General pursuant to this article, and all proceedings, findings, and sentences on new trials under this article, as approved, reviewed, or confirmed under articles 47, 48, 49 and 50, and all dismissals and discharges carried into execution pursuant to sentences adjudged on new trials and approved, reviewed, or confirmed, shall be final and conclusive and orders publishing the action of the Judge Advocate General or the proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon all departments, courts, agencies, and officers of the United States.

SUMMARY OF ARGUMENT.

- I. Even if no Oath was Administered to the Members of the Court Martial, its proceedings were not invalid.

Appellant has not alleged the facts surrounding his claim that the members of the court which tried him were not sworn. More than a mere legal conclusion should be required where, as here, the claim did not appear to be seriously urged by appellant. In any event, however, the Supreme Court in *Swaim v. United States*, 165 U.S. 553, 561, has decided that a failure to administer the oath pursuant to Article of War 19 is a mere error of procedure which is not sufficient to vitiate a court martial. In addition, the Board of Review found that the court martial was properly constituted. This finding should be upheld

in the absence of facts showing the review to be inadequate.

II. The Denial of a Continuance in Appellant's Case did not deprive his Court Martial of Jurisdiction.

The motion for continuance was made while the invasion of France was in operation. The prosecution indicated that military necessity required the trial at that time. The court decided that the defense had four days to prepare its case and that military necessity required the case be tried. On these facts the court martial did not abuse its discretion in denying the motion for continuance.

However, a continuance is a mere matter of procedure, and an error in the denial thereof does not go to the jurisdiction of the court martial. In a military court martial the scope of review is narrower than in civil criminal cases. The law in civil criminal cases cannot be assimilated to that of military habeas corpus cases. In *Burns v. Wilson*, 346 U.S. 137, the petitioner urged that they had been denied the effective representation of counsel. The Supreme Court held, however, that in the absence of any showing that the military review was inadequate, a civil court should decline to inquire into the matter. Since in this case no showing has been made that the military review was inadequate, the court below properly declined to inquire into the matter de novo.

III. Appellant did not exhaust his Administrative Remedies.

In his petition appellant advances the mere conclusion of law that he “exhausted all legal remedies that are available to him as provided by Article 53.” It is not alleged that he applied to the Judge Advocate General for relief and that this relief was denied. A court should not assume jurisdiction unless it is affirmatively shown that all administrative remedies have been exhausted. Here, appellant has failed to make a showing that he has exhausted his administrative remedies. His application is therefore premature.

IV. The District Court was not required to hold a Hearing in this case.

Statements declared to be “material factual allegations” by petitioner are mere conclusions of law. A court is not required to hold a hearing or issue an order to show cause upon the mere declaration of a petition that a court was without jurisdiction. The record concerning only substantial claim of error is supplied by appellant in his brief at page 10. Appellant’s complaint that the court looked only to the Board of Review decision is without merit since under *Burns v. Wilson*, supra, the question before the court was whether that review was inadequate.

ARGUMENT.**I. EVEN IF NO OATH WAS ADMINISTERED TO THE MEMBERS OF THE COURT MARTIAL, ITS PROCEEDINGS WERE NOT INVALID.**

Appellant claims that Article of War 19 (10 U.S.C. Section 1490) was violated in his court martial. In consequence of this violation he alleges that the court martial proceedings were void. Article of War 19 provides that oaths should be administered to various persons connected with a court martial proceedings (see statute copied at page 4 of this brief). The petition does not state the facts surrounding the formation of his court martial. A statement is made under "Contentions" that "the members of the Court that tried petitioner were not sworn". Brief reference is made to this contention under what he terms argument and memorandum of law. The allegation is not listed with the statements appellant states are in support of his petition. The allegation is a mere conclusion of law unsupported by reference to specific facts. While technical nicety may not be required of prisoners to petition for writs of habeas corpus, a court may require something more than a mere conclusion put in a petition without apparent relationship to the petition as a whole. See *United States v. Ju Toy*, 198 U.S. 253, 261; *Collins v. McDonald*, 258 U.S. 416.

However, this fact, even if true, would not be sufficient to invalidate the court martial. It relates merely to a matter of procedure and does not go to the basic jurisdiction of the court. The Supreme Court has held in a case where violation of Article of War 19 occurred that a failure to swear officers in

court martials “were merely those of procedure, and the court-martial having jurisdiction of the person accused and of the offence charged, and having acted within the scope of its lawful powers, its proceedings and sentence cannot be reviewed or set aside by the civil courts.” *Swaim v. United States*, 165 U.S. 553, 561.

This case is in line with the general rule in habeas corpus actions that mere error is not sufficient to invoke a writ of habeas corpus. Habeas corpus is not a substitute for appeal. Only those errors which affect the jurisdiction of the court martial itself may be reviewed in a habeas corpus action. All the officers which composed appellant’s court martial had taken oaths to faithfully perform their duties as officers in the United States Army. Part of these duties were serving on court martials. The lack of an oath creates no presumption that they acted in any way irregularly. Appellant has not alleged any impropriety or malfeasance on the part of the court martial members. He has not alleged that they acted in any way not consistent with the truth. He has demonstrated no prejudice from the lack of an oath even if the facts would disclose that an oath was not given.

Furthermore, the reviewing authority, which is familiar with Army court martial proceedings, found that the court martial was regularly constituted. This finding should be presumed correct in the absence of a more explicit assertion by appellant.

See:

Burns v. Wilson, *infra*.

II. THE DENIAL OF A CONTINUANCE IN APPELLANT'S CASE DID NOT DEPRIVE HIS COURT MARTIAL OF JURISDICTION.

At the trial of appellant the counsel for the defense made a motion for a continuance. This motion was denied after counsel for the prosecution informed the court that soon "after the defendant was served with the charges some five days prior to trial counsel for the defense had an opportunity to examine the file." According to the record of the trial quoted at page 10 of appellant's brief, prosecution counsel declared that defense counsel "read file over about four days ago". Counsel for the prosecution stated to the court "This case is being tried today because of the fact that there is a military necessity in existence. If it does not try the case today there is a possibility of its never being tried (Appellant's Brief, Page 10)."

This court may take judicial notice of the fact that in June of 1944 France was invaded. The court martial that tried appellant was convened in July while the success of the invasion was still in doubt. England was a debarkation center for those who were going to the front. The remarks of the prosecuting attorney become clear in this setting. The prosecution was informing the court that if the court martial did not take place at that time, the witnesses necessary to prove the prosecution's charges might never be available again. The situation of this case is very similar to that in *Wade v. Hunter*, 336 U.S. 684, where during a court martial the Commanding General withdrew the charges and continued its case to a later date and convened another court martial. In that case the

reason for this action was that "due to the tactical situation the distance to the residences of . . . witnesses has become so great that the case cannot be completed within a reasonable time." As against a claim of double jeopardy, the Supreme Court denied a writ of habeas corpus. The court declared "Momentous issues hung on the invasion and we cannot assume that these court-martial officers were not needed to perform their military functions" (Page 692). The court further declared that "courts should not attempt to review a decision on a tactical situation by the military in the absence of a showing of bad faith". *Wade v. Hunter*, supra.

The present case involves the exercise of discretion by a court martial faced with the urgency of an invasion. The granting of a continuance normally is within the discretion of the trial tribunal. The trial judge is usually in the best position to weigh the necessities of the defendant against the exigencies of the trial situation. In this case the court martial decided that the interests of justice required a trial, even at some inconvenience to the accused, where the possibility existed that if the case was continued it would never be tried. Appellant argues this case on the basis that the defense had only 24 hours to prepare for its case. However, all inferences must be indulged in to support a verdict. The record, as supplied by appellant, reveals that there was a disputed issue of fact with respect to the time the defense had to prepare its case. The prosecution attorney declared that defense counsel had the file four days

before trial. It must be assumed that the court martial resolved this conflict of fact in favor of the prosecution. The case before this court is not one of a defense prepared within 24 hours but one in which the defense had four days to prepare. It must also be assumed that the court martial found that a military necessity in fact existed which required the case to be tried then or not at all. Assuming that the defense had four days to prepare and that the trial could only be tried that day, it is difficult to see how the court abused its discretion in making the decision it did.

However, in a military habeas corpus case something more is required than mere abuse of discretion to give a civil court jurisdiction to review. It has been held that review in a military habeas corpus case does not extend "to such matters as the propositions of law set forth in the staff judge advocate's report, the sufficiency of the evidence to sustain respondent's conviction, the adequacy of the pretrial investigation, and the competence of the law member and defense counsel." *Hiatt v. Brown*, 339 U.S. 103, 110. Errors in the reception of evidence are not reviewable by civil courts. *Collins v. McDonald*, *supra*. The lack of a mandatory pre-trial investigation does not go to the jurisdiction of a court martial so to be grounds for the issuance of a writ of habeas corpus. *Humphrey v. Smith*, 336 U.S. 695. The civil courts do not have supervisory or correcting power over the proceedings of a court martial. "The correction of any errors it may have committed is for the military authorities

which are alone authorized to review its decision.” *Hiatt v. Brown*, supra, page 111.

See also:

In re Yamashita, 327 U.S. 1, 8-9.

The majority of cases cited by appellant have to do with the lack of effective representation by counsel in civil criminal proceedings. “But in military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases. *Hiatt v. Brown*, 339 U.S. 103 (1950). Thus the law which governs a civil court in the exercise of its jurisdiction over military habeas corpus applications cannot simply be assimilated to the law which governs the exercise of that power in other instances. It is *sui generis*; it must be so, because of the peculiar relationship between the civil and military law.” *Burns v. Wilson*, 346 U.S. 137, 139-140.

In the *Burns* case petitioners asserted that they had been denied due process of law by illegal detention, coerced confessions, denial of counsel of their choice and *the denial of effective representation of counsel*. The Supreme Court held, however, that absence of any showing that the military review was legally inadequate to resolve these claims that “due regard for the limitations on a civil court’s power” precludes review by the civil authorities.

In the present case no attempt was made by appellant to show that his military review was inadequate. As a matter of fact, no showing was made that all the review provided by the military was even requested.

In this case it appears that the question of the continuance was argued before the Board of Review and that the Board of Review decided adversely to appellant. "It is the limited function of the civil courts to determine whether the military have given fair consideration" to claims made. *Burns v. Wilson*, supra, at page 144.

See also:

Whelchel v. McDonald, 340 U.S. 122.

It appears to us that the *Burns* case is determinative of this appeal. Appellant's only substantial argument is that he was denied the effective representation of counsel because counsel did not have opportunity to prepare his case. In the *Burns* case the lack of effective representation by counsel was urged on the court but the court refused to go into the question. Judge Murphy examined the records of the reviewing authority and found that review was adequate. There are no facts in the record which could cause this Court to reach a contrary decision. No argument is even made of any impropriety or inadequacy in the review procedure. Judge Murphy was, therefore, correct in declining to examine the merits of appellant's contentions de novo.

In the present case it is our opinion that the court martial correctly denied a continuance. On the facts, we do not believe that even on appeal the court's action could be considered an abuse of discretion. But even assuming that an abuse of discretion existed, the granting of a continuance is merely a matter of pro-

cedure which would not go to the jurisdiction of the court, and hence is not reviewable. *In re Grimley*, 137 U.S. 147, 150. But since no contention has been made that the military review was inadequate, the court has no power to inquire into the merits of this case at all. *Burns v. Wilson*, supra.

III. APPELLANT DID NOT EXHAUST HIS ADMINISTRATIVE REMEDIES.

In his petition appellant declared that he has "exhausted all legal remedies that are available to him as provided by Article 53." This, however, is a mere allegation of law unsupported by reference to specific facts. To require a court to assume jurisdiction on a mere conclusion of law is improper. *Collins v. McDonald*, supra, at pages 420-421; *United States v. Ju Toy*, 198 U.S. 253, 261.

No facts are alleged which would indicate that application for review had been made under Article of War 53. Without exhausting his remedies under Article of War 53, appellant has no right to raise any questions in federal district court. *McMahan v. Hunter*, 179 F. 2d 661, 663; *Spencer v. Hunter*, 177 F. 2d 370. Without any facts showing that appellant has taken advantage of the Article, the district court could not assume jurisdiction. Technical nicety is not required but facts are. Conclusions will not suffice. Here appellant has failed to allege that he has applied to the judge advocate general for a new trial or to

vacate his sentence as provided for in Article of War 53.

**IV. THE DISTRICT COURT WAS NOT REQUIRED TO
HOLD A HEARING IN THIS CASE.**

Appellant argues that the facts alleged on the face of the petition, if not controverted, require the issuance of the writ. Cases are cited which declare that if not controverted, material factual allegation must be accepted as true and, if sufficient, a hearing held or the prisoner released. At page 7 of his brief he mentions three "facts" which he says bound the court to "either issue an order to show cause or issue the writ." These "facts" are "the General Court-Martial was without jurisdiction over appellant or the subject matter; that appellant was denied effective assistance of counsel and that he was denied an opportunity to prepare his defense".

We must respectfully question that these statements are facts. They are legal conclusions. A court is not required to issue an order to show cause upon a mere declaration of a petitioner that a court was without jurisdiction over him. The petitioner must do something more. He must show facts which, if true, would demonstrate lack of jurisdiction. Denial of effective assistance of counsel is a mere legal conclusion. Facts must be shown to demonstrate that such was the case. The denial of an opportunity to prepare a defense is merely another legal conclusion. Facts must be shown to demonstrate that such is the case. More than alle-

gations of law, unsupported by reference to specific facts, must be alleged before any issue is raised which required the introduction of evidence. *United States v. Ju Toy*, supra; *Collins v. McDonald*, supra; *Price v. Johnston*, 334 U.S. 266, 286.

Appellant complains that the court looked to the records of the Board of Review, but this was exactly what the Supreme Court in *Burns v. Wilson* declared that the trial court should do. The question before the court according to the *Burns* case was whether the military review was inadequate. The only documents which would bear on this question were those which revealed the extent of review in petitioner's case.

The documents in this case revealed that appellant raised the question of the denial of a continuance and that the military authorities decided adversely to him. No showing having been made that the military review was inadequate, the court properly decided that he had no jurisdiction to inquire into the matter.

Burns v. Wilson, supra.

Furthermore, this court presently has before it the only record which is important in this case; that is the record of the motion for a continuance (Appellant's Brief, p. 10). All the facts that are necessary for the decision of this case on any theory are present before the Court of Appeals. The case, therefore, should be decided on its merits.

CONCLUSION.

We respectfully urge that appellant has shown no grounds for the issuance of a writ of habeas corpus. The decision of the court below should be affirmed and, if treated as an original petition, the petition for a writ of habeas corpus should be denied.

Dated, San Francisco, California,

March 21, 1955.

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